(18,980.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 63.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., AND MILDRED TAYLOR AND DOROTHY TAYLOR, INFANTS, BY LEROY M. TAYLOR, JR., THEIR GUARDIAN AD LITEM.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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e Court of Appeals of the District of Columbia.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT ET AL. } No. 1254.

In the Supreme Court of the District of Columbia.

re The Estate of GEORGE W. UTERMEHLE, Deceased.

etition of Sarah Utermehle respectfully represents:
he is a citizen of the United States and a resident of the
Vashington in the District of Columbia.
eorge W. Utermehle, the husband of your petitioner, late
of the United States and a resident of the city of Washing-
e District of Columbia departed this life at his residence in
on Tuesday, the sixteenth day of April, A. D. 1889.
he said decedent left a last will and testament, bearing date
th day of December A. D. 1887 which is herewith pre-
probat-.
e said testator died possessed of a large personal estate
the terms of said will is all bequeathed to this petitioner,
certain legacies therein named. There are no debts.
d decedent left surviving him, his widow, Sarah Uter-
ur petitioner and as his heirs-at-law and next of kin the
hose names, residences and relationship to the deceased
ows, to wit:

Taylor, daughter, 701 M St. N. W. Washington, D. C.
E. Norment, daughter, 928 M St. N. W. " "
H. Utermehle, grandson, 1132 12" St. N. W. Washington,

f full legal age.
titioner is the executrix named in said will and as such
eves herself entitled to letters testamentary on said estate.
Therefore she prays that said will be admitted to probat-
record and letters testamentary granted unto her accord-

SARAH UTERMEHLE.

F COLUMBIA, *To wit:*

nnly swear that I have read the petition by me sub-
know the contents thereof and that the facts therein

stated upon my personal knowledge are true and that the facts therein stated upon information and belief I believe to be true.

SARAH UTERMEHLE.

Subscribed and sworn to before me this 26th day of April, A. D. 1889.

THOMAS P. WOODWARD,
Notary Public. [SEAL.]

(Endorsement: *In re* the estate of George W. Utermehle, deceased. Petition of Sarah Utermehle for probat- of will and letters testamentary. District of Columbia. Filed Apr. 26, 1889. Dorsey Clagett, register of wills.)

3 In the Supreme Court of the District of Columbia.

In re The Estate of GEORGE W. UTERMEHLE, Deceased.

On consideration of the petition of Sarah Utermehle, and it appearing to the court that the will of said deceased dated the 7th day of December, A. D. 1887, has been duly filed and the execution thereof proven by the oath of William R. Woodward, Milton C. Barnard, and Wm. Redin Woodward, the subscribing witnesses thereto, and no objection having been signified to the court, it is, this 26th day of April, A. D. 1889, ordered, adjudged, and decreed that said will be, and the same is hereby, admitted to probat- and record and that letters testamentary do issue to Sarah Utermehle, the executrix by said will appointed upon her giving bond in the penalty of twenty thousand dollars for the faithful discharge of her trust and payment of all debts and legacies.

A. B. HAGNER.

(Endorsement: *In re* estate of George W. Utermehle, deceased, Order granting probat- of will and letters testamentary to Sarah Utermehle. Bond $20,000. Bonded and qualified. W. R. Woodward, proctor. District of Columbia. Filed Apr. 26, 1889. Dorsey Clagett, register of wills.)

4 In the Supreme Court of the District of Columbia.

In re The Estate of GEORGE W. UTERMEHLE, Deceased.

The petition of Sarah Utermehle respectfully represents: That by an order granted the 26th day of April, A. D. 1889, the will of George W. Utermehle, deceased, was admitted to probate and letters testamentary were granted to your petitioner upon the bond of twenty thousand dollars for the faithful discharge of her duties and the payment of the debts and legacies.

That your petitioner is advised that the said order should have

been conditioned for the paying all just debts of and claims against the deceased and all damages which shall be recovered against her as executrix and also all legacies bequeathed by the will. She therefore prays that the order of said court passed on the 26th day of April, 1889, may be modified in accordance with the above petition.

And she will ever pray, &c.

SARAH UTERMEHLE.

DISTRICT OF COLUMBIA, *To wit:*

I solemnly swear that I have read the aforegoing petition, by me subscribed, and know the contents thereof and that the matters and things therein stated upon my personal knowledge are true, and that those stated upon information and belief I believe to be true.

SARAH UTERMEHLE.

5 Subscribed and sworn to before me this 3rd day of May A. D. 1889.

THOMAS P. WOODWARD. [SEAL.]

(Endorsement: *In re* estate of Geo. W. Utermehle, deceased. Petition of Sarah Utermehle for modification of former order. District of Columbia. Filed May 3, 1889. Dorsey Clagett, register of wills.)

6 In the Supreme Court of the District of Columbia.

In re The Estate of GEORGE W. UTERMEHLE, Deceased.

On consideration of the petition of Sarah Utermehle and it appearing to the court that the will of said deceased dated the 7th day of December A. D. 1887 has been duly filed and the execution thereof proven by the oaths of William R. Woodward, Milton C. Barnard and Wm. Redin Woodward, the subscribing witnesses thereto and no objection having been signified to the court, it was, on the 26th day of April A. D. 1889, admitted to probat- and record and letters testamentary issued to Sarah Utermehle, the executrix by said will appointed she having given bond in the penalty of twenty thousand dollars she is now hereby authorized to give a bond of $20,000 conditioned for paying all just debts of and claims against the deceased, and all damages which shall be recovered against her as executrix and also all legacies bequeathed by the will. This decree is granted this 3rd day of May, 1889, modifying one passed on the 26th day of April A. D. 1889, and that upon the filing of the bond hereby required, the bond heretofore filed shall be cancelled.

W. S. COX, *J.*

(Endorsement: *In re* estate of Geo. W. Utermehle, deceased. Order modifying former decree. District of Columbia. Filed May 3, 1889. Dorsey Clagett, register of wills.)

7 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm'n Doc. 14.

Sarah Utermehle, widow of the late George W. Utermehle, deceased, and executrix and residuary legatee under his last will and testament bearing date on the seventh day of December A. D. 1887, admitted to probate herein on the 26th day of April A. D. 1889, recorded in Liber "Wills No. 27," folio 42, being duly sworn according to law deposes and says, that she duly qualified as executrix under said last will and testament on the 26th day of April A. D. 1889 and gave a special bond to pay debts and legacies on the third day of May 1889, and that she published the usual notice to creditors in the Washington Law Reporter volume XVII Nos. 18, 19, & 20, published on Wednesdays May 1, 1889, May 8, 1889 and May 15th 1889, as directed by the order of this court. That she has paid all the debts of the deceased that have come to her knowledge or of which she has had any notice or knowledge, including funeral expenses and the proper costs of administration. She has also paid all legacies bequeathed by the will of her said testator, as evidenced by the receipts in full of the legatees filed herewith and numbered to correspond with the items herein stated, as follows, to wit:

8

1889.			
May 9.	Charles H. Utermehle, note of $750, with accrued interest, and interest to date...	Vou. 1...	$2116.88
Nov. 26.	Sophie Hansemann, niece.....	" 2...	3000.
Aug. 21.	Louise Seitz..... "	" 3...	3000.
"	Minna Seitz..... "	" 4...	3000.
	Total amount of legacies paid.....		$11116.88

The last-named three legatees are the daughters of Ernst Utermehle a deceased brother of said George W. Utermehle deceased, and all three reside in Germany.

SARAH UTERMEHLE,
Ex'trix & Legatee.

Subscribed and sworn to in duplicate before me this 14th day of May A. D. 1890, and the duplicate delivered to Mrs. Utermehle, executrix.

M. J. GRIFFITH,
Notary Public, D. C.

[SEAL.]

(Endorsement: *In re* estate of George W. Utermehle, deceased. Sworn statement of Sarah Utermehle, executrix, in lieu of an account. District of Columbia. Filed May 14, 1890. Dorsey Clagett, register of wills.)

9 Received Washington May 9, 1889 of Sarah Utermehle executrix of the will of the late George W. Utermehle, two thousand one hundred and sixteen $\frac{88}{100}$ dollars, in full for note of seven hundred and fifty dollars, with accrued interest and interest to date, which was left to Charles H. Utermehle in will of the late George W. Utermehle.

C. H. UTERMEHLE.

10 *Report of Auditor.*

No. 8140, Docket 22.

SCHEDULE B.

To George W. Utermehle:

Note of Charles H. Utermehle dated Nov. 15, 1864, payable in 4 years with interest from date and secured by conveyance of the property to A. Thos. Bradley in trust.....	$750.00
Interest to date of sale.....	878.38
	$1628.38

True copy of first paragraph of Schedule B. Auditor's report filed Oct. 31, 1884, in equity cause No. 8140, Utermehle *vs.* Utermehle, *et al.*

R. J. MEIGS, *Clerk.*

[SEAL.] By S. P. WILLIAMS, *Ass't Clerk.*

(Endorsement: *In re* estate of George W. Utermehle, deceased. Receipt of Chas. H. Utermehle, for note of $750 with accrued interest to date (May 9, 1889), in all $2,116.88. District of Columbia. Filed May 14, 1890. Dorsey Clagett, register of wills.)

11 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Doc. 14.

Caveat.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

The petition of Charles H. Utermehle respectfully shows to the court as follows:

1. Your petitioner is a citizen of the United States and a resident of the city of Washington, District of Columbia.

2. Heretofore, to wit: on the 26th day of April, A. D. 1889, a paper-writing bearing date the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, in and by which Sarah Utermehle was appointed executrix

thereof, having been propounded before the said court, as such last will and testament, was, by said court admitted to probate as a will of personal property and letters testamentary granted thereunder to the executrix therein named.

3. Your petitioner further shows that he is a grandson and
12 one of the next of kin of the said decedent, and, pursuant to the statute in such case made and provided, doth, hereby, contest the said probate and the validity of said paper-writing, so purporting to be such last will and testament and avers that said paper-writing ought not to be held operative either as a will of real or personal property and, for that purpose, doth allege against the validity of such alleged will and against the competency of the proof thereof and against the sufficiency of said letters testamentary:

First. That the said George W. Utermehle, deceased, was not, at the time of the making and subscribing, or of the acknowledging by him, the said George W. Utermehle, deceased, of the paper-writing purporting to be his last will and testament, of sound and disposing mind and capable of executing a valid deed or contract.

Second. That the said paper-writing, purporting to be such last will and testament, was obtained and the execution thereof by the said George W. Utermehle, deceased, procured by undue influence practiced against and upon the said George W. Utermehle by Rose M. Taylor (*née* Utermehle) and Leroy M. Taylor, Sr., or one of them or some other person or persons unknown to your petitioner.

Third. That said paper-writing was not freely and voluntarily executed or made as his last will and testament by said George W. Utermehle, deceased, but that the subscription thereto and publication thereof by him, the said George W. Utermehle, was procured by fraud and coercion exercised upon him, the said George W. Utermehle, deceased, by the said Rose M. Taylor and Leroy M. Taylor, Sr., or one of them, or by some other person or persons to your
13 petitioner unknown.

Wherefore, your petitioner prays:—

1. That the probate, as aforesaid, of said paper-writing as a will of personal property may be set aside, and that said paper-writing may be refused probate as a will of real estate.

2. That appropriate issues may be framed under the direction of this court to be tried before a jury thereof to determine the allegations of fact as to the validity of the paper-writing purporting to be, as aforesaid, the last will and testament of said George W. Utermehle, deceased.

3. That proper process may issue directed to and requiring the parties in interest, to answer the exigency hereof by a day certain to be therein designated.

4. And that your petitioner may have such other and further relief as the nature of the case may require.

And, as in duty bound, your petitioner will ever pray, &c.

CHARLES H. UTERMEHLE.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Caveator.

DISTRICT OF COLUMBIA, *To wit:*

I, Charles H. Utermehle, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true, and those stated upon information and belief I believe to be true.

CHARLES H. UTERMEHLE.

Subscribed and sworn to before me this 4th day of June, A. D. 1900.

RUTLEDGE WILLSON,
[SEAL.] *Notary Public, D. C.*

(Endorsement: *In re* estate George W. Utermehle. Caveat to will. Filed June 9th, 1900. Louis A. Dent.)

14 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

For answer to the petition and caveat of Charles H. Utermehle, filed herein on the ninth day of June, 1900, the respondents, Rosa M. Taylor and Mamie E. Norment, respectfully show to the court as follows:

1. They admit that the petitioner, Charles H. Utermehle, is a citizen of the United States and a resident of the city of Washington.

2. They admit that on the 26th day of April, 1889, the paper-writing dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, in and by which Sarah Utermehle was appointed executrix thereof, was by this court admitted to probate and letters testamentary granted thereunder to the said Sarah Utermehle.

3. They admit that the petitioner is a grandson and one of the next of kin of said George W. Utermehle. They dispute, as hereinafter set forth, the right of the petitioner at this time to contest the probate and validity of said paper-writing. They deny that said writing ought not to be held operative either as a will of real or personal property and aver and insist that said paper-writing was and is in all respects the valid last will and testament of said George W. Utermehle.

15 They deny that said George W. Utermehle, at the time he made and subscribed the said paper-writing, was not of sound and disposing mind or capable of executing a valid deed or contract and aver on the contrary, that at that time, he was mentally qualified in every respect to make a valid will.

They deny that the execution of said paper-writing by the said George W. Utermehle was procured by undue influence practiced

against or upon him by one of these respondents, Rosa M. Taylor, and by Leroy M. Taylor, Sr., or by either of them, or by any other person or persons, and they aver on the contrary, that the execution of said paper-writing as his last will and testament by said George W. Utermehle was his free and voluntary act.

They deny that said paper-writing was not freely and voluntarily executed and made as his last will and testament by said George W. Utermehle. They deny that *either the subscription* thereto or the publication thereof by the said George W. Utermehle was procured by fraud or coercion exercised upon him by one of these respondents, Rosa M. Taylor and Leroy M. Taylor Sr., or by either of them or by any other person or persons and they reiterate that the execution of said paper-writing by said George W. Utermehle, as his last will and testament was his own free and deliberate act.

4. For a further answer to said petition and caveat, these respondents aver that said paper-writing purporting to be the last will and testament of said George W. Utermehle, was filed in this court on the twenty-third day of April, 1889; that on the twenty-sixth day
16 of April, 1889, Sarah Utermehle, the widow of the said George W. Utermehle and the person named in said paper-writing as the executrix thereof, filed in this court a petition, a copy of which is appended hereto, marked Exhibit A and made part hereof, in and by which she prayed that the said paper-writing be admitted to probate and record as the last will and testament of said George W. Utermehle and that letters testamentary might be granted to her accordingly; that said Charles H. Utermehle, as the grandson and one of the next of kin of said George W. Utermehle, (he then being over twenty-one years of age) was duly advised of the filing of said petition and that by a paper-writing duly signed by him, and which was filed in this court on the twenty-sixth day of April, 1889, a copy of which last-mentioned writing is appended hereto marked Exhibit B and made part hereof, said Charles H. Utermehle (under the name of C. H. Utermehle) waived citation or publication by advertisement as to said petition and consented that this court might act upon said petition without further notice to him; that thereafter, pursuant to said appearance and waiver and consent on the part of said Charles H. Utermehle, said paper-writing, dated the 7th day of December, 1887, was by the decree of this court on the 26th day of April, 1889, admitted to probate and record and letters testamentary directed to issue to Sarah Utermehle as executrix; that by section 10 of the act of Congress approved June 8th, 1898, entitled, "An act conferring on the supreme court of the District of Columbia jurisdiction to take proof of execution of wills affecting real estate, and for other purposes," it is provided, among other things, that the record in the office of the register of wills
17 of this District of any will theretofore admitted to probate in said District and which should not have been annulled or declared void according to law prior to the passage of said act, should be admitted and held at law or in equity as of the same force and effect as if such will or codicil had been duly proved and admitted to

probate and record under and in accordance with the provisions of said act, provided, that the provisions of said section 10, should not apply to any proceedings commenced within one year after the passage of said act, wherein or whereby the validity of such will or codicil should be called in question; that the said Charles H. Utermehle did not within one year after the passage of said act by any proceeding at law or in equity or otherwise, call in question or in any way assail the validity of said paper-writing, dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle; and these respondents plead said section of said act as a bar to the further prosecution of this proceeding by Charles H. Utermehle.

5. And for a further answer to said petition and caveat these respondents aver that said paper-writing purporting to be the last will and testament of said George W. Utermehle, was filed in this court on the twenty-third day of April, 1889; that on the twenty sixth day of April, 1889, Sarah Utermehle, the widow of said George W. Utermehle and the person named in said paper-writing as the executrix thereof, filed in this court a petition, a copy of which is appended hereto marked Exhibit A and made a part hereof, in and by which she prayed that the said paper-writing be admitted to probate and record as the last will and testament of said George W. Utermehle and that letters
18 testamentary might be granted to her accordingly; that said Charles H. Utermehle, as the grandson and one of the next — kin of said George W. Utermehle, (he being then over twenty-one years of age) was duly advised of the filing of said petition and that by a paper-writing duly signed by him, and which was filed in this court on the twenty-sixth day of April, 1889, a copy of which last-mentioned writing is appended hereto marked Exhibit B and made part thereof, said Charles H. Utermehle (under the name of C. H. Utermehle) waived citation or publication by advertisement as to said petition and consented that this court might act upon said petition without further notice to him; that thereafter, pursuant to said appearance and waiver and consent on the part of said Charles H. Utermehle, said paper-writing, dated the 7th day of December, 1887, was by the decree of this court on the 26th day of April, 1889, admitted to probate and record and letters testamentary directed to issue to Sarah Utermehle as executrix; that said will has never been annulled or declared void and has never been even assailed prior to the filing of the petition to which this is an answer; that by said paper-writing dated the 7th day of December, 1887, there was devised to the said Charles H. Utermehle, his heirs and assigns, a parcel of real estate at the southeast corner of 6th and Louisiana avenue, in the city of Washington, District of Columbia, known as the Young law building; that by said instrument there was bequeathed to said Charles H. Utermehle the principal and interest of a certain note for the sum of $750.00, which was held and owned by the said George W. Utermehle at the time of his death; that under said provisions of said paper-
19 writing, said Charles H. Utermehle, after the admission of the same to probate and record in this court, as aforesaid,

accepted and took possession of said real estate and continued to hold and own and receive the rents and profits of the same as his own until the twenty-fourth day of March, 1891, when he sold and conveyed the same to one John T. Meany, and received therefor in cash and in notes representing the deferred payments (all of which notes were subsequently paid to him) the sum of twenty thousand dollars; that on the 9th day of May, 1899, the said Charles H. Utermehle demanded and received from said Sarah Utermehle, as executrix as aforesaid, in payment of said legacy of said note and interest, the sum of $2,116.88, and gave therefor to said Sarah Utermehle as executrix as aforesaid a receipt for said sum, a copy of which is hereto appended and marked Exhibit C and made a part hereof; that by said paper-writing dated the 7th day of December, 1887, there was given and bequeathed to Sarah Utermehle, all of the personal property of said George W. Utermehle, excepting the principal and interest of said note for $750.00, and excepting also the sum of $9,000.00 bequeathed to three nieces of said George W. Utermehle; that under said bequest to said Sarah Utermehle, she, the said Sarah Utermehle in her own right received a large number of promissory notes and other securities comprising the personal estate of said George W. Utermehle at the time of his death, with the exceptions above stated; that the value of the personal property so received by said Sarah Utermehle in her own right was about the sum of three hundred thousand dollars; that by said paper-writing dated the 7th day of December, 1887, there was devised to the
20 said Sarah Utermehle, her heirs and assigns, the residence of said George W. Utermehle and the property adjoining, being square No. 765 in said city of Washington, which said real estate at the time of the death of said George W. Utermehle was of the value of about $90,000.00; that said Sarah Utermehle departed this life on the thirteenth day of March, 1893, leaving a last will and testament dated July 5th, 1889, which was admitted to probate and record in this court on the seventeenth day of March, 1893; that in and by said last will and testament said Sarah Utermehle gave, devised and bequeathed to the said Charles H. Utermehle one-third of her estate including said square No. 765, and a large part of the personal property bequeathed to said Sarah Utermehle by said George W. Utermehle as aforesaid; that in and by said last will and testament of July 5th, 1889, said Sarah Utermehle appointed these respondents the executrices thereof and they duly accepted said appointment and qualified thereunder and that thereafter said Charles H. Utermehle demanded and received of these respondents, as executrices as aforesaid, his one-third of said personal property amounting to over ninety-five thousand dollars and accepted under said will of said Sarah Utermehle the one-third interest thereby devised to him in said square No. 765 and appropriated his one-third interest in the rents and profits thereof to his own use; and that by the foregoing acts and by divers other acts said Charles H. Utermehle, after the said paper-writing of December 7th, 1887, had been admitted to probate as the last will and testament of said George W. Utermehle,

and continuing through a period of over ten years elected to acknowledge the same as the valid last will and testament of said George W. Utermehle.

21 Wherefore these respondents say the said Charles H. Utermehle is estopped now and forever hereafter from disputing in this proceeding, or in any other proceeding, the validity of said paper-writing as the last will and testament of said George W. Utermehle, and they plead the facts set forth in this paragraph of this answer as a bar to the further prosecution of this proceeding by the said Charles H. Utermehle.

ROSE M. TAYLOR,
MAMIE E. NORMENT,
Respondents.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Respondents.

We, Rosa M. Taylor and Mamie E. Norment, on oath say that we have read the foregoing answer by us subscribed and know the contents thereof; that the statements therein made as of our own knowledge are true; and that those which are made as on information from others, we believe to be true.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 18th day of July, A. D. 1900.

GEO. R. LINKINS, [SEAL.]
Notary Public, D. C.

(Endorsement: Estate of George W. Utermehle. Answer of Rose M. Taylor and Mamie E. Norment to petition and caveat of Charles H. Utermehle. Filed Jul- 19, 1900. Louis A. Dent, register of wills.)

22 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

The petitioners, Rosa M. Taylor and Mamie E. Norment, respectfully represent:

1. They are citizens of the United States and residents of the District of Columbia, and file this petition in their own right.

2. On the 16th day of April, 1889, George W. Utermehle, the father of the petitioners, departed this life in the city of Washing-

ton, in the District of Columbia. At the time of his death said George W. Utermehle was a resident of said District and had his domicile there and was a citizen of the United States.

3. Said George W. Utermehle left a last will and testament, dated the 7th day of December, 1887, which was duly admitted to probate and record in this court as said last will and testament on the 26th day of April, 1889. Said instrument is in the custody of the register of wills of this District. A copy thereof is hereto appended marked Exhibit A and made part hereof.

By said last will and testament, said George W. Utermehle appointed his wife, Sarah Utermehle, sole executrix thereof and by the decree of this court of the 26th day of April, 1889, admitting said will to probate and record in this court, it was further ordered that letters testamentary thereon should issue to said Sarah Utermehle as executrix, as aforesaid. Said Sarah Utermehle accepted said
23 appointment and duly qualified thereunder and before her death, which occur-ed on the thirteenth day of March, 1893, she fully administered the personal estate of said George W. Utermehle, her final account as such executrix having been filed in this court on the 14th day of May, 1890. Said George W. Utermehle, at the time of his death, was the owner in fee-simple of a large amount of real estate in the District of Columbia, the total value thereof, at the time of his death, being about nine hundred thousand dollars. By said last will and testament he devised one parcel of said real estate, square 765 in said city of Washington, to his wife, said Sarah Utermehle, her heirs and assigns and the parcel hereinafter described in paragraph 6, to his grandson, Charles H. Utermehle. All the rest of his real estate he devised to these petitioners, their heirs and assigns, as tenants in common, share and share alike, to be equally divided between them.

4. The sole heirs of said George W. Utermehle were his two daughters, your petitioners, and a grandson, Charles H. Utermehle, whose father was a son of said George W. Utermehle.

5. Said Charles H. Utermehle was twenty-three years of age, at the time of the death of said George W. Utermehle. He was then and now is a citizen of the United States and a resident of the District of Columbia.

6. By said paper-writing dated the 7th day of December, 1887, there was devised to the said Charles H. Utermehle, his heirs and assigns, a parcel of real estate at the southeast corner of 6th and Louisiana avenue, in the city of Washington, District of Columbia, known as the Young law building; and by said instrument there was bequeathed to said Charles H. Utermehle the principal and interest of a certain note in the sum of $750.00, which was held and owned by the said George W. Utermehle at the time of his death. Under said provisions of said paper-writing, said Charles H. Utermehle, after the admission of the same to probate and record in this court, as aforesaid, accepted and took possession of said real estate and continued to hold
24 and receive and dispose of the rents and profits of the same as his own until the twenty-fourth day of March, 1891,

when he sold and conveyed the same to one John T. Meany, and received therefor in cash and in notes representing deferred payments (all of which notes were subsequently paid to him) the sum of twenty thousand dollars. On the 9th day of May, 1899, the said Charles H. Utermehle demanded and received from said Sarah Utermehle, as executrix as aforesaid, in payment of said legacy of said note and interest, the sum of $2,116.88 and gave to said Sarah Utermehle as executrix as aforesaid a receipt for said sum, a copy of which is hereto appended and marked Exhibit B and made a part hereof. By said paper-writing dated the 7th day of December, 1887, there was given and bequeathed to Sarah Utermehle, all of the personal property of said George W. Utermehle, excepting the principal and interest of said note of $750.00 and excepting also the sum of $9,000.00 bequeathed to three nieces of said George W. Utermehle. Under said bequest to said Sarah Utermehle, she, the said Sarah Utermehle in her own right received a large number of promissory notes and other securities and assets comprising the personal estate of said George W. Utermehle at the time of his death, with the exceptions above noted. The value of the personal property so received by said Sarah Utermehle in her own right was about the sum of three hundred thousand dollars. By said paper-writing dated the 7th day of December, 1887, there was devised to the said Sarah Utermehle, her heirs and assigns, the residence of said George W. Utermehle and the property adjoining, being square No. 765 in said city of Washington, which said real estate at the time of the death of said George W. Utermehle was of the value of about $90,000.00. Said Sarah Utermehle departed this life on the thirteenth day of March, 1893, leaving a last will and testament dated July 5th, 1889, which was admitted to probate and record in this court on the 17th day of March, 1893, in and by which said last will and testament said Sarah Utermehle gave, devised and bequeathed one-third of all her estate to the said Charles H. Utermehle. Included in the property, a one-third interest in which was so bequeathed and devised to said Charles H. Utermehle, was square No. 765, and a large part of the personal property bequeathed to said Sarah Utermehle, as aforesaid. In and by said last will and testament of July 5th, 1889, said Sarah Utermehle appointed these petitioners the executrices thereof and they duly accepted said appointment and qualified thereunder. Thereafter said Charles H. Utermehle demanded and received of these petitioners, as executrices, as aforesaid, his one-third of said personal property, and accepted under said will of said Sarah Utermehle, the one-third interest thereby devised to him in said square No. 765 and appropriated his one-third interest and the rents and profits thereof to his own use. The petitioners are advised and aver that by the foregoing acts and by divers other acts of said Charles H. Utermehle in affirmance of said paper-writing dated December 7th, 1887, as the last will and testament of said George W. Utermehle, the said Charles H. Utermehle elected to acknowledge the same as the valid last will and testament of said George W. Utermehle.

7. Relying upon the conduct of said Charles H. Utermehle set forth in the preceding paragraph of this petition, your petitioners never made any claim to any part of the estate of said George W. Utermehle, real or personal, which was devised or bequeathed to said Charles H. Utermehle, either directly by said last will and testament of said George W. Utermehle, or indirectly through the said will of said Sarah Utermehle, and further relying upon said conduct of said Charles H. Utermehle and not suspecting or having any cause to suspect that said Charles H. Utermehle intended to dispute the validity of said will of said George W. Utermehle, they from time to time sold and conveyed to divers persons various parcels of the real estate which came to them under the said will of their father to purchasers who accepted the title to said real
26 estate and paid full value for the same; such purchasers also relying upon the aforesaid conduct of said Charles H. Utermehle, as it appeared of record as aforesaid.

Wherefore these petitioners say that said Charles H. Utermehle is estopped now and forever hereafter from disputing in this proceeding, or any other proceeding, the validity of said paper-writing as the last will and testament of said George W. Utermehle.

Nevertheless, said Charles H. Utermehle on the ninth day of June, 1900, by a petition and caveat filed in this court, undertook to assail on divers grounds the validity of said paper, dated December 7th, 1887, as the last will and testament of said George W. Utermehle. On the twenty-third day of June, 1900, a suit in ejectment No. 44011, on the law side of this court was instituted by him against the petitioner, Rosa M. Taylor, by which he seeks to recover a one-third interest in over thirty different parcels of the real estate devised to the petitioners as aforesaid. Your petitioners are informed and believe and aver that he is about to begin a similar suit against your petitioner Mamie E. Norment, the purpose of said Charles H. Utermehle in such ejectment suits, as petitioners are informed and believe, being to assail the validity of said paper-writing of December 7th, 1887, as such last will and testament.

Wherefore your petitioners, in order that their title to so much of said real estate as they still own, may be finally quieted and established, as well as that the title to their grantees and those claiming under such grantees, of so much of the real estate as they or either of them have or has sold and conveyed to other persons may be so established, now pray:

1. That said paper-writing dated December 7th, 1887, may be admitted to probate and record in this court as the last will and testament of said George W. Utermehle as a will of real estate.

2. That a summons may issue out of this court addressed to said Charles H. Utermehle, requiring him at some certain day to
27 be named therein, to show cause, if any he has, why said last-mentioned paper should not be admitted to probate as the last will and testament of said George W. Utermehle, as a will of real estate.

3. That the petitioners may have such other and further relief as to the court may seem meet.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Petitioners.

We, Rosa M. Taylor and Mamie E. Norment, on oath say that we have read the foregoing petition by us subscribed and know the contents thereof; that the statements therein made as of our own knowledge are true; and that those which are made as upon information from others, we believe to be true.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 18th day of July, 1900.

GEO. R. LINKINS, [SEAL.]
Notary Public, D. C.

(Endorsement: *In re* estate of Geo. W. Utermehle. Petition of Rose M. Taylor and Mamie E. Norment for probate of will as a will of real estate. Filed Jul- 19, 1900. Louis A. Dent, register of wills, D. C.)

28 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

The caveatees, Rosa M. Taylor and Mamie E. Norment move the court to refuse to frame any issues under the petition and caveat filed herein on the 9th day of June, 1900, by Charles H. Utermehle and to dismiss said caveat. This motion is based upon matters apparent on the record in this case and especially upon the following grounds:

1. By the answer to said petition and caveat filed herein by these caveatees on the 19th day of July, 1900, section 10 of an act of Congress approved June 8, 1898, is pleaded by way of a statute of limitations as a bar to the prosecution of said caveat and no reply thereto has been filed, or set up in any way.

2. By said answer certain facts are set up and pleaded as an estoppel against said Charles H. Utermehle's further prosecution of said caveat, which facts do in law so estop said Charles H. Utermehle and none of said facts has been controverted by said Charles H. Utermehle.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Caveators, Rosa M. Taylor and Mamie E. Norment.

To D. W. Baker and Wilton J. Lambert, attorneys for Charles H. Utermehle.

GENTLEMEN: Please take notice that we shall call up the
29 foregoing motion on Wednesday, the 17th day of October, 1900, at one o'clock p. m., or as soon thereafter as counsel can be heard.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Petitioners, Rosa M. Taylor and Mamie E. Norment.

Service of a copy of the foregoing motion and notice acknowledged this 13 day of October, 1900.

D. W. BAKER.

(Endorsement: In the matter of the estate of George W. Utermehle, deceased. Motion for refusal to frame issues. Filed Oct. 18, 1900. Louis A. Dent, register of wills, D. C.)

30 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

The petitioners and caveatees in this case, Rosa M. Taylor and Mamie E. Norment, move the court to forthwith admit to probate as a will of real estate the paper-writing dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, which was admitted to probate in this court as a will of personal estate on the 26th day of April, 1889.

This motion is based upon matters apparent on the record of the proceedings in this case, and especially on the ground that by the petition which was filed in this court on the 19th day of July, 1900, by these petitioners, certain facts were set forth which amount to, and were in and by said petition specifically set up as, an estoppel against Charles H. Utermehle, from disputing in this proceeding or otherwise, the validity of said paper-writing as the last will and testament of said George W. Utermehle, deceased; that said Charles H. Utermehle on the 21st day of July, 1900, was duly served with a summons issuing out of this court requiring him to show cause on or before the 31st day of July, 1900, why said paper-writing should not be admitted to probate as a will of real estate; that on the 27th day of September, 1900, said Charles H. Utermehle filed in this case a paper-writing purporting to be a caveat to the admission of said paper-writing to probate as a will of real estate;
31 and that neither in his said caveat, nor in any other way, has the said Charles H. Utermehle controverted the facts so set up against him as an estoppel or any of them.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Petitioners, Rosa M. Taylor and Mamie E. Norment.

To D. W. Baker and Wilton J. Lambert, attorneys for Charles H. Utermehle.

GENTLEMEN: Please take notice that we shall call up the foregoing motion on Wednesday, the 17th day of October, 1900, at one o'clock, p. m., or as soon thereafter as counsel can be heard.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Petitioners, Rosa M. Taylor and Mamie E. Norment.

Service of a copy of the foregoing motion and notice acknowledged this 13th day of October, 1900.

D. W. BAKER.

(Endorsement: In the matter of the estate of George W. Utermehle, deceased. Motion to admit to probate will of real estate. Filed Oct. 18, 1902. Louis A. Dent, register of wills, D. C.)

32 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

The petition of Charles H. Utermehle respectfully represents to the court as follows:

1. Your petitioner is a citizen of the United Satates, and a resident of the city of Washington, District of Columbia.

2. Heretofore, to wit, on or about the 19th day of July A. D. 1900, a paper-writing bearing date the 7th day of December A. D. 1887, purporting to be the last will and testament of George W. Utermehle, deceased, in and by which Sarah Utermehle was nominated executrix thereof, was propounded before the said court as such last will and testament of said George W. Utermehle, deceased, as a will of real estate, and application made by two of the next of kin of the said decedent for the admission of the said paper-writing to probate and record as a will of real property as aforesaid.

3. Your petitioner further shows that he is a grandson and one of the next of kin of the said decedent, and pursuant to the statute in such case made and provided, doth hereby contest the validity of the said paper-writing, so purporting to be said last will and
33 testament as a will of real property, and for that purpose doth allege against the validity of such alleged last will and testament:

First. That the said George W. Utermehle, deceased, was not at the time of the making and subscribing, or of the acknowledging by

him, the said George W. Utermehle, deceased, of the paper-writing purporting to be his last will and testament as a will of real property, of sound and disposing mind and memory or capable of executing a valid deed or contract.

Second. That the said paper-writing, purporting to be such last will and testament as a will of real property was obtained, and the execution thereof by the said George W. Utermehle, deceased, procured by undue influence practiced against and upon the said George W. Utermehle, deceased, by Rose M. Taylor (*née* Utermehle) and Leroy M. Taylor, or one of them, or some other person or persons unknown to your petitioner.

Third. That the said paper-writing was not freely or voluntarily executed or made as his last will and testament as a will of real property by said George W. Utermehle, deceased, but that the subscription thereto and the publication thereof by him, the said George W. Utermehle, deceased, was procured by fraud and coercion exercised upon him, the said decedent, by the said Rose M. Taylor and Leroy M. Taylor or one of them, or some other person or persons to your petitioner unknown.

Wherefore your petitioner prays:

1. That the said paper-writing, so purporting as aforesaid to be the last will and testament of the said George W. Utermehle, deceased, as a will of real property, be refused probate and
34 admission to record as a will of real estate.

2. That appropriate issues be framed under the direction of this court, to be tried before a jury thereof, to determine the allegations of fact as to the validity of the paper-writing, purporting to be, as aforesaid, the last will and testament of the said George W. Utermehle, deceased, as a will of real estate.

3. That the proper process may issue directed to, and requiring, the parties in interest to answer the exigency hereof by a day certain to be designated therein.

4. That your petitioner may have such other and further relief as the nature of the case may require.

And, as in duty bound, your petitioner will ever pray, etc.

CHARLES H. UTERMEHLE.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Caveator.

35 DISTRICT OF COLUMBIA, *To wit:*

I, Charles H. Utermehle, on oath say, that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters therein stated on my personal knowledge I know to be true, and those stated on information and belief, I believe to be true.

CHARLES H. UTERMEHLE.

Subscribed and sworn to before me this 19th day of September, A. D. 1900.

RUTLEDGE WILLSON,
[SEAL.] *Notary Public, D. C.*

(Endorsement: *In re* estate of George W. Utermehle, deceased. Caveat. Filed Sep. 27, 1900. Louis A. Dent, register of wills, D. C.)

36 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

For answer to the caveat of Charles H. Utermehle, filed herein on the 27th day of September, 1900, in addition to the matters set forth in their petition filed herein on the 19th day of July, 1900, which they hereby reaffirm, the said petitioners, Rosa M. Taylor and Mamie E. Norment, aver that said paper-writing dated December 7th, 1887, and purporting to be the last will and testament of said George W. Utermehle, was filed in this court on the 23rd day of April, 1889; that on the 26th day of April, 1889, Sarah Utermehle, the widow of the said George W. Utermehle and the person named in said paper-writing as the executrix thereof, filed in this court a petition, a copy of which is appended hereto, marked Exhibit A and made part hereof, in and by which she prayed that the said paper-writing be admitted to probate and record as the last will and testament of said George W. Utermehle and that letters testamentary might be granted to her accordingly; that said Charles H. Utermehle, as the grandson and one of the next of kin of said George W. Utermehle (he then being over twenty-one years of age), was duly advised of the filing of said petition and that by a paper-writing duly signed by him, and which was filed in this court on the 26th day of April, 1889, a copy of which last-mentioned writing is appended hereto marked Exhibit B
37 and made part hereof, said Charles H. Utermehle (under the name of C. H. Utermehle) waived citation or publication by advertisement as to said petition and consented that this court might act upon said petition without further notice to him; that thereafter, pursuant to said appearance and waiver and consent on the part of said Charles H. Utermehle, said paper-writing, dated the 7th day of December, 1887, was by the decree of this court on the 26th day of April, 1889, admitted to probate and record and letters testamentary directed to issue to Sarah Utermehle as executrix; that by section 10 of the act of Congress approved June 8th, 1898, entitled "An act conferring on the supreme court of the District of Columbia jurisdiction to take proof of execution of wills affecting real estate, and for other purposes," it is provided, among other things, that the record in the office of the register of wills of this District of any will theretofore admitted to probate in said District and which should

not have been annulled or declared void according to law prior to the passage of said act, should be admitted and held at law or in equity as of the same force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of said act, provided, that the provisions of said section 10, should not apply to any proceedings commenced within one year after the passage of said act, wherein or whereby the validity of such will or codicil should be called in question; and that the said Charles H. Utermehle did not within one year after the passage of said act by any proceeding at law or in equity or otherwise, call in question or in any way assail the validity of said
38 paper-writing, dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle; and these respondents plead said section of said act as a bar to the further prosecution of said caveat filed herein by said Charles H. Utermehle, on the 27th day of September, 1900, as aforesaid, and as a bar to the opposition on the part of said Charles H. Utermehle in any manner to the admission of said paper-writing to probate in this court as a will of real estate.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Rosa M. Taylor and Mamie E. Norment.

We, Rosa M. Taylor and Mamie E. Norment, on oath say that we have read the foregoing answer by us subscribed and know the contents thereof, and that the statements made therein are true to the best of our knowledge and belief.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

Subscribed and sworn to before me, this 29th day of October, 1900.

GEO. R. LINKINS, [SEAL.]
Notary Public, D. C.

39 EXHIBIT A.

In the Supreme Court of the District of Columbia.

In re Estate of GEORGE W. UTERMEHLE, Deceased.

The petition of Sarah Utermehle respectfully represents:

That she is a citizen of the United States and a resident of the city of Washington in the District of Columbia. That George W. Utermehle, the husband of your petitioner, late a citizen of the United States and a resident of the city of Washington in the District of Columbia departed this life at his residence in said city on Tuesday the sixteenth day of April, A. D. 1889.

That the said decedent left a last will and testament, bearing date the seventh day of December, A. D. 1887, which is herewith presented for probate.

That the said testator died possessed of a large personal estate which by the terms of said will is all bequeathed to this petitioner, excepting certain legacies therein named.

There are no debts.

The said decedent left surviving him, his widow, Sarah Utermehle, your petitioner and as his heirs-at-law and next of kin the persons whose names, residences and relationship to the deceased are as follows, to wit:

Rosa M. Taylor, daughter, 701 M St., N. W., Washington, D. C.
Mamie E. Norment, daughter, 928 M St., N. W., Washington, D. C.
Charles H. Utermehle, grandson, 1132 12th St., N. W., Washington, D. C.,

all being of full legal age.

40 Your petitioner is the executrix named in said will and as such believes herself entitled to letters testamentary on said estate.

Wherefore she prays that said will be admitted to probate and record and letters testamentary granted unto her accordingly.

SARAH UTERMEHLE.

DISTRICT OF COLUMBIA, *To wit:*

I do solemnly swear that I have read the petition by me subscribed and know the contents thereof and that the facts therein stated upon my personal knowledge are true and that the facts therein stated upon information and belief I believe to be true.

SARAH UTERMEHLE.

Subscribed and sworn to before me, this 26th day of April, A. D., 1889.

[SEAL.] THOMAS P. WOODWARD,
Notary Public.

41 EXHIBIT B.

In the Supreme Court of the District of Columbia.

In re The Estate of GEORGE W. UTERMEHLE, Deceased.

The undersigned, next of kin and only heirs-at-law of George W. Utermehle, deceased, being acquainted with the contents of the petition of Sarah Utermehle, bearing date the 26th day of April A. D. 1889, hereby waive citation or publication of advertisement so far as they — concerned, and consent that the court may act upon said petition without further notice to them.

(Names.)	(Addresses.)
ROSA M. TAYLOR,	701 *M St. N. W.*
MAMIE E. NORMENT,	928 *M St. N. W.*
C. H. UTERMEHLE,	1132 12*th St. N. W.*

W. R. Woodward.

(Endorsement: Estate of George W. Utermehle. Answer to caveat. Filed Sept. 27, 1900. Filed Oct. 30, 1900. Louis A. Dent, register of wills, D. C.)

42 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

To the supreme court of the District of Columbia, holding a special term for orphans' court business:

The answer of Charles H. Utermehle to so much of the petition of Rose M. Taylor and Mamie E. Norment filed in the above-entitled cause on the 19th day of July, A. D. 1900, propounding a certain paper-writing for probate and record as a last will of George W. Utermehle, deceased, as avers certain alleged facts relied upon as constituting an estoppel against this respondent from filing any caveat to said probate and record of the said will.

This respondent in no way waiving but on the contrary especially insisting upon the caveats heretofore filed by him contesting the validity of said paper-writing or alleged will, and now and at all times hereafter saving and reserving unto himself all benefit and advantage which can or may be had to the many errors, uncertainties and other imperfections contained in said petition, and specifically protesting against, and denying that this court has jurisdiction to determine the question of alleged estoppel so attempted to
43 be raised against respondent, for answer thereunto, or unto so much and such parts thereof as this respondent is advised is or are material or necessary for him to make answer unto, answering says:

He admits the averments touching the residence and citizenship of the parties hereto and the death of George W. Utermehle; he also admits that a paper-writing bearing the date mentioned was filed and probably is now on file in the office of the register of wills for this District, and that an order was passed by this court, in the absence of any protest or objection, admitting said paper-writing to probate and record as a will of personal property, but he avers that said paper-writing has never been admitted to probate or record or rendered valid in any way as to real property. On the contrary he charges that said paper-writing is not a valid will or testament as to either personal or real property, that its validity has been attacked by two caveats which have been filed in these proceedings each setting forth the objection existing against the operation of such alleged will; that it is true the widow of George W. Utermehle, Sarah Utermehle was without objection, appointed executrix of the personal property comprised in said estate and that she attempted to act under this authority. He avers that the real property left by said

George W. Utermehle was, at the time of his death, and is now worth about twelve hundred thousand dollars instead of only nine hundred thousand dollars. He admits that by said alleged will a valuable parcel of real estate, to wit: square 765 in the
44 city of Washington, District of Columbia, was attempted to be devised to Sarah Utermehle, and he also admits that by the same instrument practically all the remainder of the real property belonging to said deceased was pretended to be devised to the petitioners, Rose M. Taylor and Mamie E. Norment as tenants in common to the exclusion of your respondent. It is true also that the father of this respondent, Charles H. Utermehle, Senior, died in 1867, and respondent avers that up to the time of his death said Charles H. Utermehle, Senior was highly esteemed by his father the late George W. Utermehle and was in close and confidential business relations with him. Further answering said alleged estoppel respondent says that he was about twenty-three years of age at the time of his grandfather's death, and was then a citizen of the United States, but it is not true that he was or had then recently been a resident of the District of Columbia but that on the contrary he had for some time, to wit: for about six years just prior thereto resided in the city and county of Frederick, in the State of Maryland, and that just before and at the time of the death of George W. Utermehle respondent had been in a poor state of health and had during the last two or three years of his grandfather's life seen but little of him on account of which he had lacked the opportunity to become then acquainted with the habits or mental or physical condition of deceased. Continuing his answer to so much of said petition as relates to said estoppel and to his right to file a caveat, as aforesaid, respondent says it is true that by said paper-writing claimed to be the will of
45 said George W. Utermehle, and purporting to have been executed only about fifteen or sixteen months prior to his death the property mentioned in said petition was pretended to be devised to respondent, that not knowing his rights at the time and having been misled and purposely deceived as to his rights or as to what he might expect, by misrepresentation made by the petitioner, Rose M. Taylor, in the presence of, and acquiesced in by, the petitioner Mamie E. Norment and being also under a misapprehension and ignorant as to the real circumstances surrounding the alleged execution of said paper-writing which said circumstances he has been advised and believes and therefore avers render said paper-writing null and void as a testamentary document, he did take said piece or parcel of ground and premises and did under such circumstances, and so believing, make sale thereof to satisfy his urgent needs, but on or about the 19th day of May, A. D. 1900, having discovered the misrepresentations and fraud practiced upon him by petitioner, and being through divers persons apprised for the first time of the true and infirm mental and physical condition of his grandfather at the time of the supposed execution of said will, and just learning also of the undue influence practiced

upon deceased by the petitioner, Rose M. Taylor and her husband, to secure the will in question, and of the fact as disclosed to him for the first time through the medium of testimony given by both said Rose M. Taylor and her husband, Leroy M. Taylor, in certain equity suits that said parties had practically dictated and controlled both the actions and business of George
46 W. Utermehle during the last three years of his life, and that during said time deceased had been under their control, habitually intoxicated and drunk through the excessive use of alcholic stimulants, and respondent having then for the first time consulted counsel as to his position and rights and being for the first time made aware thereof he at once advised petitioners of this discovery by sending them each a statement to that effect, and having arranged to obtain the property comprised in said alleged devise he forthwith informed petitioners by letters sent to each of them on or about the 19th day of May, A. D. 1900, that he had been under a misapprehension and was ignorant regarding his rights, and had also been misled by misrepresentation made by those interested under said alleged will; that he had now been advised for the first time of what were his rights and that said paper-writing, which had never been probated as to real property or become operative as a will of such, was in fact invalid and ought not to be held of any legal effect, wherefore that he had as a matter of fact only taken a one-third interest as a tenant in common with petitioners in the pretended devise in question and tendered himself ready to account to them for their two-thirds share in said property, which will fully and at large appear reference being had to a copy of said letters hereto appended marked "Exhibit A" and prayed to be read as part hereof. Further answering said part of said petition he says that under said alleged will the principal and interest of an alleged note for seven hundred and fifty dollars was pretended to be bequeathed to respondent but he
47 charges the facts in this connection to be that at the time of the death of his father in 1867 a part of the latter's estate consisted of a certain piece or parcel of land in the District of Columbia known as lot numbered 2 in square numbered 448 situate upon the north side of M street, between Sixth and Seventh streets, west, which was subject to a deed of trust given on November 15, 1864, to secure George W. Utermehle the sum of three thousand dollars said to have been represented by four notes of seven hundred and fifty dollars each, bearing interest, upon which respondent's father was liable; that after the death of his father the latter's administrator paid said George W. Utermehle three of said notes, the same being all presented or then claimed by him to be due him and received from said George W. Utermehle the sum of about nine hundred dollars in balancing accounts between them; that about fifteen years thereafter an order of the court was passed in equity cause No. 8140 in this District, authorizing a sale of said property when for the first time, according to the testimony adduced in said cause, George W. Utermehle exhibited a fourth note for the sum

of seven hundred and fifty dollars with accrued interest thereon which he claimed was secured by the aforesaid trust and had not been paid. This fourth note with interest thereon amounted at said period to the sum of sixteen hundred and twenty-eight dollars and thirty-eight cents and this sum was actually paid to said George W. Utermehle out of the proceeds derived from said sale and the note was delivered to said administrators. Upon information and belief respondent avers that
48 this note had really been paid to said George W. Utermehle during the lifetime of his father and that said administrators were entitled to a release of said trust when they assumed the three notes aforesaid but that for some reason they had neglected to obtain or require such release; that said George W. Utermehle well knew said note had been satisfied on account of which so many years were allowed to elapse and the legacy mentioned was in fact nothing more than an effort to make proper restitution to respondent in this regard; that at the time of his death George W. Utermehle did not own or hold said notes as is falsely averred and while said administratrix did remit to respondent the sum mentioned no delivery was made to him of the note and both she and these petitioners well knew such pretended legacy of an alleged note not even held by deceased was merely an artifice intended to deceive respondent, and that he immediately upon discovering the real condition, through the testimony in said equity suit and otherwise, offerred and tendered in and by said letters to make proper settlement regarding also this pretended legacy. It is true that by said paper-writing George W. Utermehle is alleged to have attempted to bequeath to Sarah Utermehle all of his personal property save about nine thousand dollars which was distributed in several legacies, but he avers this personal estate to have been worth much more than the sum of three hundred thousand dollars and that it was in fact worth more nearly six or seven hundred thousand dollars and was so represented by petitioners to respondent they at said time declaring it to be of nearly equal value
49 with the real property comprised in said estate. The real property mentioned as having been devised to said Sarah Utermehle was in fact worth nothing like the sum of ninety thousand dollars as a one-third interest in same was sold on or about July 13th, 1898, for thirteen thousand five hundred dollars which would make the entire value considerably less than forty-five thousand dollars. Further answering said alleged estoppel and his right to file a caveat to said will respondent says that just after the funeral of said George W. Utermehle he, with petitioners and Sarah Utermehle returned to the latter's house where the alleged will was read and at a meeting of the same parties held at the same place the following day the petitioner Rose M. Taylor in the presence of said parties announced to respondent that they realized he had been cut off with almost nothing, but that there would be no difficulty in adjusting this as they had arranged with the widow, Sarah Utermehle, who she declared had received about one-half the estate under said

will, that she, Sarah Utermehle, would by her will arrange matters justly and provide for respondent to receive ultimately as much of the estate of George W. Utermehle as each of petitioners, to which statement and agreement both Sarah Utermehle and Mamie E. Norment assented, your respondent, however, being ignorant, and under a misapprehension concerning his rights, as aforesaid, relied upon these assurances and promises to assure him fair treatment; that at said time said Rosa M. Taylor also declared that even the insignificant devise said to have been left to the respondent had been inserted in said
50 alleged will under the direction of herself and her husband.

Not, however, mindful of or regarding said agreement in the slightest degree said Sarah Utermehle without the knowledge of respondent did, three or four months after the death of her said husband, attempt to make a will which is now on file in this District and is referred to by petitioners, and by which she in fact undertook to do nothing more than to provide for an equal distribution of what property she might die possessed of to petitioners and respondent share and share alike, such distribution being practically the same disposition the law would have made had she died intestate, and it is true moreover that said Sarah Utermehle died upon the 13th day of March, 1893, leaving no other testamentary paper so far as respondent is advised save the one above mentioned, and without making any provision whatsoever to the end that respondent's share might equal that of the other heirs of George W. Utermehle as had been stipulated. Further replying to so much of said petition as attempts to charge estoppel on his part respondent says that between the time of the death of said George W. Utermehle and the death of his widow, Sarah Utermehle, both of said petitioners, especially Rose M. Taylor and her husband Leroy M. Taylor, systematically secured large sums of money from said widow the petitioner Rose M. Taylor going so far at one time as to prevail upon her mother to buy from her a tract of about 27 acres of land owned by her upon Queen's Chapel road in the District of Columbia, for about thirty thousand dollars when the actual value of said property was not more than five thousand dollars and
51 had in fact been offered for sale by George W. Utermehle within a year or so of his death for the sum of forty-five hundred dollars; that after said purchase was made by Sarah Utermehle the land in question was donated by her for a National Lutheran Home for the Aged and is now held by said institution. Respondent declares that by reason of the drain made upon the finances of said widow and bequests made by her to charity her large estate was reduced from about six or seven hundred thousand dollars in 1889 to less than two hundred thousand dollars in 1893 exclusive of certain promissory notes made by her several heirs-at-law. Further answering said part of said petition respondent says that immediately after the death of Sarah Utermehle respondent and petitioners met in the house of decedent and respondent was informed by the petitioner Rose M. Taylor, much to his surprise that his grandmother had died a comparatively poor

woman whereupon respondent unhesitatingly expressed his amazement that such could be the case, not being then able to understand how the large estate she had held in 1889 could have been so nearly absorbed, and when later he was advised for the first time of the testamentary disposition deceased had attempted to make of the comparatively small amount of property remaining to her he was both surprised and pained to find that no regard had been had by either deceased or petitioners for their pledge or agreement to equalize respondent's share as one of the three heirs-at-law of George W. Utermehle, and he without delay censured and upbraided petitioners especially said Rose M. Taylor for their and her actions in this regard but being ignorant of any rights he
52 then possessed and before having an opportunity to consult counsel respondent was stricken dangerously ill and confined to his bed in Frederick, Maryland, in a critical condition for a period of six weeks or more after which as a result of said illness he remained in a greatly impaired physical and mental condition for over two years, during which time all matters connected with the management and settlement of his property interests, including those devolving upon him as one of the heirs-at-law or alleged devisees and legatees of Sarah Utermehle, were attended to by his agent, Charles W. Handy, a real-estate broker in the city of Washington, District of Columbia, your respondent continuing during said period to be unable to transact or enter into business details remained at his home in Frederick without being advised of the matters and things aforesaid affecting the validity of the alleged will of George W. Utermehle or of his rights in the premises as set forth or of what was being done or had been done in connection with said estate in the courts of this District until November, 1899, when after many years' residence away he returned to the city of Washington in said District and upon receiving certain information which placed him upon inquiry he became for the first time apprised about May, 1900, of the true conditions aforesaid and of his legal rights in connection therewith. Referring to the statements touching the alleged waiver of citation signed by him to the will of George W. Utermehle or the probate thereof as to personalty respondent says that at said time he was in a very weak physical and mental condition and remembers that he was
53 taken in great haste in a cab which had been sent for him upon a very inclement day to the court-house in this city where he met Dr. L. M. Taylor the husband of one of the petitioners and the late Samuel Norment who presented to him a paper which he was assured not only did not prejudice any of his rights but the signing of which would be worth to him at least one hundred thousand dollars and which he signed without reading or knowing the contents thereof but has since been advised was in fact the waiver referred to. Respondent denies that he has knowingly ever been guilty of any act or acts in recognition of the validity of the paper-writing alleged to be the will of George W. Utermehle, and avers upon the contrary that immediately upon being

advised of his rights and as soon as the knowledge of the true facts affecting the validity of said alleged will came to his attention he at once repudiated all interest under same and as soon after the death of Sarah Utermehle as he became aware of his real rights under said agreement with said widow and petitioners he served notice upon the latter, that as a matter of fact what portion he took of the estate of Sarah Utermehle was taken by him as one of the heirs at law of both George W. Utermehle and Sarah Utermehle for which he is willing to be charged as part of his said distributive share. Further answering said allegation of estoppel respondent says that he is advised and believes and therefor- avers it to be a fact that about the year 1859 said George W. Utermehle, being then upon the eve of taking a voyage to Europe, made a last will and testament in and by which he left practically
54 all he possessed to his son Charles H. Utermehle, for whom he had a great affection, in trust for the latter as well as for petitioners, but that upon the petitioner Rose M. Taylor being advised of the contents of said will she objected so strenuously to same and caused the testator so much worry and annoyance that said will was either destroyed or fell into the possession of said petitioner; that said Rose M. Taylor and her husband especially disliked Charles H. Utermehle, Senior, were jealous of the regard held for him by his father and allowed that dislike and envy on their part to extend to respondent after the death of his father and notwithstanding the fact that said George W. Utermehle when in his right mind and free from the undue influence of said petitioner and her husband, always treated respondent with great consideration and regard, respondent avers that said parties did all possible to poison the mind of deceased and prejudice him against respondent, he also says that said George W. Utermehle had frequently expressed his appreciation of him and had signified an intention and desire to properly provide for him but he charges this intention was defeated by the coercion and fraud practiced upon said deceased when in an enfeebled condition both mentally and physically. Further answering as aforesaid this respondent says it is true no demand was made by petitioners upon him for any part of the insignificant devise alleged to have been made to him by George W. Utermehle, but considering the fact that under said alleged will over nine-tenths of the entire estate, exclusive of that which was allotted to Sarah Utermehle, went into
55 the possession of petitioners and that through their fraud and misrepresentation practiced upon respondent such was retained by them and that through the ignorance of respondent petitioners were enabled to successfully carry into effect a conspiracy to defraud and cheat respondent out of a greater part of the property held by Sarah Utermehle, it could hardly be expected that such avarice on their part would allow petitioners to endanger their title to any property so obtained in an endeavor to strip respondent of two-thirds of the little they had permitted and directed should be assigned to him. Concerning the action of petitioners in refrain-

ing from claiming a two-thirds interest in what came to him as an heir and alleged devisee of said Sarah Utermehle respondent only deems it necessary to say that such interest having in reality devolved upon him by operation of the law of descent such a claim would have been futile and absurd upon their part especially in the face of the fact that petitioners had actually acquired and taken two-thirds of said property. Further answering said allegations of estoppel respondent says that he is advised and believes and therefore avers that petitioners have no right to come into a court and attempt to contend that he is estopped from asserting his rights when as a matter of fact he relied upon their false and fraudulent representations believing same to be true while they must have known the conditions surrounding the case and not only were cognizant that the alleged will of George W. Utermehle and the entire proceedings thereunder were tainted with gross fraud on their part in an en-
56 deavor to carry into effect a conspiracy to defeat respondent of his lawful rights; that both petitioners and especially Rose M. Taylor must not only have suspected but have known that once advised of the true state of facts and of his rights respondent would dispute and contest the validity of said paper-writing; that while it may be true petitioners have attempted to dispose of some of the property originally comprised in said estate, they have with the proceeds thereof acquired other property of equal or greater value in this jurisdiction, and as a matter of fact still have by far the greater portion of said estate now in their possession and they have no right to plead such action on their part to cover and shield themselves from the consequences of their fraudulent acts when they stand amply able to answer to both respondent and any innocent third party or parties who may show themselves to have been in any way aggrieved or injuriously affected by such alleged sale or sales. Respondent further submits that if any right exists to plead such alleged sale or sales in bar against him it does not exist to the benefit of the parties making said petition but on behalf only of innocent third parties whose rights can be shown to be jeopardized, none of whom are present in these proceedings. Respondent continuing says that he admits the allegations concerning the filing by him of the caveat and ejectment suit and submits that such action was proper, and was indeed his duty under the circumstances, but he avers no caveat or legal action was filed or taken in the matter until
57 at least two months had elapsed after sending said letter of May 19th, 1900, during which time no response was received from petitioners and respondent insists that all matters of fact in controversy must be the subject of plenary proceedings and that an issue as to the alleged estoppel shall be made and sent out with other issues for trial by and before a jury according to law.

CHARLES H. UTERMEHLE.

R. ROSS PERRY,
WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Respondent.

DISTRICT OF COLUMBIA, *To wit:*

I, Charles H. Utermehle, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated on information and belief I believe to be true.

CHARLES H. UTERMEHLE.

Subscribed and sworn to before me this second day of November, A. D. 1900.

RUTLEDGE WILLSON,
[SEAL.] *Notary Public, D. C.*

58 "EXHIBIT A."

WASHINGTON, D. C., *May 19th*, 1900.

Mrs. Rosa M. Taylor, # 1221 Mass. Ave. N. W., city.

DEAR MADAM: In view of the fact that I was under a misapprehension and ignorant regarding my rights at the time my grandfather, George W. Utermehle died and that misrepresentations were made to me by those interested touching both my rights and interests in his estate, I hereby notify you that I deny the validity of the paper-writing alleged to be the last will and testament of said George W. Utermehle which has been admitted to probate in the orphans' court for personal property. I contend that said alleged will has never been operative in connection with real property, in which event the real interest vested in me to the building and ground known as Young's law building being the premises designated as lot No. 29, square No. 490, in this city, was merely one-third interest in said property as tenant in common with the other heirs-at-law of said deceased. I hereby tender myself ready to account upon demand to both you and Mrs. Norment for the one-third interest to which each of you, in such case, are entitled as two of the heirs-at-law of George W. Utermehle, in both said property and the rents and profits from same from the time of the latter's death.

I also tender myself ready upon demand to make proper settlement to both you and Mrs. Norment for the $750 note with accrued interest thereon which had been already paid and was pretended to be bequeathed to me by said alleged will.

59 Kindly favor me with an answer touching the matter contained in this communication as soon as possible.

Very respectfully yours, C. H. UTERMEHLE.

(Endorsement: *In re* estate of George W. Utermehle, deceased. Answers of C. H. Utermehle to part of petition of Taylor and Norment alleging estoppel on his part. Filed Nov. 3, 1900. Louis A. Dent, register of wills, D. C.)

60 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

Now comes Charles H. Utermehle, caveator in the above-entitled cause and excepts to the plea filed by Rosa M. Taylor and Mamie E. Norment to the caveat filed * A [on] * the 27th day of September, 1900, which said plea purports to be in bar to the caveat filed by said Charles H. Utermehle, and for reasons for said exceptions, says:

First. That said plea is bad in form in that it sets out several matters, some of which raise questions of fact, and others questions of law.

Second. That said plea is bad in form in that it is multifarious in setting up several matters independent of the question raised by section 10 of the act of Congress, approved June 6th, 1898.

Third. That said plea is bad in form in that as an inducement to the bar set out in said plea, it sets up several matters of fact which have no connection with the question raised by said plea, and upon which said facts issue could be joined without any regard to the main issue attempted to be raised by said plea.

61 Fourth. That said plea is bad in substance in that the matters and alledged facts set out therein do not constitute a bar to the caveat filed by the said Charles H. Utermehle.

Fifth. That said plea is bad in substance in that section 10 of the act of Congress of June 6th, 1898 in no way affects the right of the caveator, Charles H. Utermehle, to file his caveat to the petition for the probat- of the will as a will of real property.

Sixth. That said plea is bad in substance in that the petition filed for the probat- of said will as a will of real property, is filed under section 8 of said act, approved June 6th, 1898, which said act provides for the probating of a will as a will of real property, which has been heretofore probated, and that said proceeding to probat- said will as a will of real property, is an original proceeding and the caveat thereto was properly filed.

Seventh. That said plea is bad in substance in that it attempts to make section 10 of the act of Congress of June 6th, 1898, a statute divesting vested rights and impairing the rights of the said Charles H. Utermehle in and to the real estate set out in said petition.

Eighth. That said plea is bad in substance in that the attempt to set up said act of Congress as a bar to the rights *if* said caveator is an attempt to divest him of vested rights by said act of Congress, and that in so far as said act of Congress attempts to divest said caveator of his vested rights, the same is unconstitutional, null and void.

62 Ninth. That said plea should be stricken from the records of this court because it is filed without leave of court and

* Insertion & erasure made in pencil.

after a complete record has been made in said cause and after the motion to admit said will to probat-, said plea being apparently a plea of the statute of limitations.

R. ROSS PERRY,
WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Caveator.

(Endorsement: In the matter of the estate of George Utermehle, deceased. Exceptions to plea filed by Rosa M. Taylor and Mamie E. Norment. Filed Nov. 17, 1900. Louis A. Dent, register of wills, D. C.)

63 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

Now comes Charles H. Utermehle, caveator in the above-entitled cause and excepts to so much of the answer of Rosa M. Taylor and Mamie E. Norment, filed by them as an answer to the petition and caveat of Charles H. Utermehle, filed on the 19th day of June 1900, which attempts to set up as a bar to said caveat filed on said day, section 10 of the act of June 6, 1898, and for reasons for said exception says:

First. That said answer is bad in substance in that section ten of said act of Congress of June 6, 1898, in no way affects the right of the caveator, Charles H. Utermehle, to file his caveat to said will of George W. Utermehle, deceased.

Second. That said answer is bad in substance in that it attempts to make section ten of the act of Congress of June 6, 1898, a statute divesting the vested rights and impairing the rights of Charles H. Utermehle, in and to the property of the said George W. Utermehle, deceased.

Third. That said answer is bad in substance in that the attempt to set up said act of Congress as a bar to the rights of said caveator, is an attempt to divest him of vested rights by said act of Congress, and that in so far as said act of Congress attempts to divest said caveator of his vested rights in and to the property of the said George
64 W. Utermehle, deceased, the same is unconstitutional, null and void.

Fourth. That said answer is bad in form in that it attempts to set up as a bar to said caveat filed by the said caveator the said statute as matter of law and at the same time sets out certain facts surrounding the probate of said will, which in no way affect the question attempted to be raised by setting up said statute as a bar to said caveat.

R. ROSS PERRY,
WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Caveator.

(Endorsement: In the matter of the estate of George W. Utermehle, deceased. Exceptions of Charles H. Utermehle to answer of Rosa Taylor and Mamie Norment. Filed Nov. 17, 1900. Louis A. Dent, register of wills, D. C.)

65 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Admr. Doc. 14.

The caveatees, Rose M. Taylor and Mamie E. Norment, hereby join issue with the caveator upon his answer filed in the above-entitled cause the third day of November, 1900.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Caveatees.

(Endorsement: Estate of George W. Utermehle. Replication. Filed Jan. 7, 1901. Louis A. Dent, register of wills, D. C.)

66 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Admr. Doc. 14.

The caveatees, Rose M. Taylor and Mamie E. Norment, hereby join issue with the caveator upon his replication filed in the above-entitled cause the 17th day of November, 1900.

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Attorneys for Caveatees.

(Endorsement: Estate of George W. Utermehle. Rejoinder. Filed Jan. 7, 1901. Louis A. Dent, register of wills, D. C.)

67 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

Petition of Leroy M. Taylor.

Now comes Leroy M. Taylor, one of the caveatees in the above-entitled cause by A. S. Worthington and Thomas P. Woodward, his attorneys, and suggests to the court the death of Rosa M. Taylor, one of the caveatees, who departed this life on or about the 22nd

day of January, 1901, testate, having by her last will and testament, which has been duly admitted to probate and record in this court, devised all of her estate and property to this petitioner, her husband, subject only to payment of debts and an annu-ty of three thousand dollars per annum to Leroy M. Taylor, Junior. A copy of said will is hereto appended marked Exhibit "A A" and made part hereof. While by its terms said last will and testament devises and bequeathes to this petitioner all of the estate of which the said Rosa M. Taylor died seized and possessed, subject only to the payment of debts and an annuity as above set forth, this petitioner in fact holds said estate and property upon certain trusts and conditions communicated to him by the said Rosa M. Taylor, his wife, at and before the time said will was executed, in accordance with which communication and direction the petitioner has made and executed a formal declaration of trust showing that said Leroy M. Taylor and his children are interested in said estate and in the result of this litigation. A copy of said declaration of trust is filed here-
68 with marked Exhibit "B B" and made part hereof. Said Rosa M. Taylor left her surviving her son, said Leroy M. Taylor, Junior, as her sole heir-at-law.

Said Leroy M. Taylor, Junior, is married and has two children, Mildred Taylor, aged nine years and Dorothy Taylor, aged eight years.

In consideration of the premises the said Leroy M. Taylor, by his said attorneys hereby prays the court that he, the said Leroy M. Taylor, in his own right and as executor and trustee, said Leroy M. Taylor, Junior, and said Mildred Taylor and Dorothy Taylor, be made parties to these proceedings in the place and stead of said Rosa M. Taylor, deceased, and that proper process may be issued accordingly.

L. M. TAYLOR, *Petitioner.*

A. S. WORTHINGTON,
THOMAS P. WOODWARD,
Solicitors for Petitioner, Leroy M. Taylor, in His Own Right and as Executor and Trustee.

I do sol-mnly swear that I have read the above petition by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated on information and belief I believe to be true.

L. M. TAYLOR.

Subscribed and sworn to before me this 18th day of March 1901.

GEO. R. LINKINS,
[SEAL.] *Notary Public, D. C.*

69 EXHIBIT "A A."

Will of Rosa M. Taylor.

In the name of God, amen.

I, Rosa M. Taylor, of the city of Washington in the District of Columbia, being of sound mind, memory and understanding, do make, publish and declare this to be my last will and testament, in manner following, to wit:

After payment of all my just debts by my executor hereinafter named, I give, devise and bequeath all of my estate, real, personal and mixed of every kind and wherever situated, of which I am now seized or which I shall hereafter acquire and of which I shall die possessed to my husband, Leroy M. Taylor, his heirs and assigns, subject to the payment to my son, Leroy M. Taylor, Junior, of an annuity of three thousand dollars, payable in monthly installments of two hundred and fifty dollars on the first of each and every month.

I hereby nominate, constitute and appoint my said husband, Leroy M. Taylor, the executor of this, my last will and testament, hereby revoking any and all wills heretofore made by me.

I request that in view of the fact that I have no debts that the bond required of my executor may be nominal.

In testimony whereof I have hereunto set my hand and affixed my seal at the said city of Washington on the third day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

ROSE M. TAYLOR. [SEAL.]

Signed, sealed, published and declared by the said testatrix, Rosa M. Taylor, as and for her last will and testament, in the presence of us, who at her request, in her presence and in the presence
70 of each other have subscribed hereto our names as witnesses.

WM. REDIN WOODWARD.
WM. R. WOODWARD.
MILTON C. BARNARD.

71 EXHIBIT "B B."

This agreement made this 15th day of February in the year of our Lord one thousand nine hundred and one, by and between Leroy M. Taylor, of the District of Columbia, party of the first part, and Leroy M. Taylor, Junior, of the same place, party of the second part, witnesseth, that—

Whereas, by her last will and testament bearing date the third day of December, A. D., 1889, Rose M. Taylor, deceased, late of the District of Columbia, devised all of her estate and property of every kind to the party of the first part, subject only to the payment of

debts and an annuity of three thousand dollars per annum to the said party of the second part; and whereas although said party of the first part by the terms of said will appears to take an absolute title to all the estate and property therein and thereby devised and bequeathed, subject only to the charges hereinbefore mentioned, said devise and request was in fact made to said party of the first part upon certain trusts communicated to him by his wife the said Rose M. Taylor, which said trusts were never reduced to writing and are in substance as hereinafter set forth.

Now therefore this agreement witnesseth, that the said party of the first part, for and in consideration of the premises and the sum of one dollar to him in hand paid, receipt whereof is hereby acknowledged, does hereby covenant and agree to and with the said party of the second part, that he, the said party of the first part holds and is seized of all the estate and property devised and bequeathed to him by the last will and testament of Rose M. Taylor, bearing date the 3rd day of December, 1889, and that he will continue to hold and be seized of the same in and upon the following trusts and no others, namely:

I. To hold the same for and during the natural life of him, the said party of the first part, and to take, have, use, receive,
72 and enjoy the same, and the rents, issues and profits thereof, subject only to the payment of taxes, insurance, repairs and all expenses incident to the due and proper care, management and preservation of the said estate and property, and to payment of the annuity to the said party of the second part, given and granted to him under and by the said instrument.

II. To devise and bequeath all of the said estate and property by the last will and testament of him, the said party of the first part, to a suitable person, persons, or trust company, in and upon the following trusts, namely:

1. To hold an undivided half interest in and to all of the said property and estate and in trust to permit the said party of the second part to take, have, use, receive and enjoy the same, and the rents, issues and profits thereof, for his own use and benefit, so long as he shall live, subject only to the payment of taxes, insurance, repairs and necessary expenses as aforesaid, so long as the said party of the second part shall live, and in trust to hold the said undivided moiety in trust for any and all children of the said party of the second part who may be living at the time of his death, the net rents, issues and profits thereof to be applied to their maintenance, education and advancement in life, for the period of their several and respective lives, and upon the death of the last survivor of them, the whole of the said moiety to be divided absolutely and in fee-simple between their several heirs-at-law, the descendants of each of said children to take *per stirpes* and not *per capita*, and the heirs of any children or other descendant who may die in the lifetime of the survivors or last survivor of the children of the said party of the second part, or in the lifetime of the said party of the second

part, to be entitled to and receive that share of the said net
73 rents, issues and profits which their deceased parent would receive if living, share and share alike.

2. To hold the remaining one-half interest in all said estate and property, from and after the death of said party of the first part, in trust for any and all children of said party of the second part, and their heirs, severally and respectively, upon the same trusts as set forth in the preceding paragraph hereof with respect to the first undivided moiety after the death of said party of the second part.

3. In case said party of the second part should die in the lifetime of said party of the first part, then in trust to hold all of the said property and estate for the benefit of the children or other descendants of the said party of the second part upon the same trusts as are hereinbefore set out in the event that said party of the second part should survive the said party of the first part.

4. In the event of the death of all the descendants of the said party of the second part prior to his death, then in trust to hold all of said property and estate for the benefit of the said party of the second part so long as he shall live, all the rents, issues and profits and income which the said party of the second part shall be entitled to receive under the trusts of said will, to be paid to him monthly, without power of anticipation, or to be applied to his use and benefit, as in the best judgment and discretion of the trustee or trustees shall prove most to his advantage.

III. It is, however, mutually and specially hereby covenanted and agreed by and between the parties hereto that the said party of the first part shall have the right to pay, one-third out of the income and two-thirds out of the principal of the said estate, such part of the expense of the pending litigation over the will of the
74 late George W. Utermehle as shall fall to the share of the estate of the said Rose M. Taylor; and, further, that with the concurrence of the said parties of the first and second parts, the said party of the first part may from time to time sell and convey such portions of the said estate and property as he may deem it expedient and advantageous to do, and to reinvest the proceeds of any such sale or sales in other property to be held on like trusts as are in this instrument expressed, with the like power to the trustees or trustee under said will.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals the day and year first hereinbefore written.

L. M. TAYLOR. [SEAL.]
L. M. TAYLOR, JR. [SEAL.]

Signed, sealed and delivered in the presence of—
THOMAS P. WOODWARD,
As to L. M. Taylor and L. M. Taylor, Jr.

(Endorsement: Estate of George W. Utermehle. Petition of Leroy M. Taylor suggesting the death of Rosa M. Taylor. Filed Mar. 18, 1901. Louis A. Dent, register of wills, D. C.)

75 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Administration Docket 14.

It appearing to the court that Mildred Taylor and Dorothy Taylor, infants under the age of fourteen years, parties to the above-entitled cause, are present in court, it is, by the court, this twenty-seventh day of March, A. D. 1901, adjudged, ordered and decreed that Leroy M. Taylor, Junior, be, and he is hereby, appointed guardian *ad litem* for said infants to answer, in their behalf, all matters in the proceedings in the above-entitled cause.

CHAS. C. COLE.

(Endorsement: Estate of George W. Utermehle, deceased. Order appointing Leroy M. Taylor, Junior, guardian *ad litem* for Mildred Taylor and Dorothy Taylor. Filed Mar. 27, 1901. Louis A. Dent, register of wills, D. C.)

76 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Administration Docket 14.

On consideration of the petition of Leroy M. Taylor, after argument by counsel for the parties in interest, it is, by the court, this twenty-seventh day of March, A. D. 1901, ordered that Leroy M. Taylor, in his own right and as executor and trustee under the last will and testament of Rosa M. Taylor, deceased, Leroy M. Taylor, Junior Mildred Taylor and Dorothy Taylor, be, and they are hereby made parties to these proceedings in the place and stead of Rosa M. Taylor, deceased, and that process may issue accordingly.

CHAS. C. COLE, *J.*

(Endorsement: Estate of George W. Utermehle, deceased. Order making Leroy M. Taylor, Leroy M. Taylor, trustee and executor, Leroy M. Taylor, Jr., Mildred Taylor, and Dorothy Taylor parties in the place and stead of Rosa M. Taylor, deceased. Filed Mar. 27, 1901. Louis A. Dent, register of wills, D. C.)

77 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Doc. 14.

Upon motion of counsel for caveator, Charles H. Utermehle, and after hearing counsel for the caveatees, it is this 27th day of March,

A. D. 1901, ordered that the following issues be, and they are hereby, framed for trial by a jury of this court.

1. Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property?

2. Was the said Charles H. Utermehle, on the 27th day of September, 1900, estopped as against said Rosa M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of real estate?

3. At the time of the execution by said George W. Utermehle of said paper-writing dated December seventh, 1887, as his last
78 will and testament, was the said George W. Utermehle of sound and disposing mind and capable of executing a valid deed or contract?

4. Was the execution of said paper-writing, dated December seventh, 1887, by said George W. Utermehle, as his last will and testament, procured by the undue influence of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or any other person or persons?

5. Was the execution of said paper-writing, dated the seventh day of December, 1887, by George W. Utermehle, as his last will and testament, procured by the fraud of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or of any other person or persons?

6. Was the execution of said paper-writing, dated December seventh, 1887, by said George W. Utermehle, as his last will and testament, procured by the duress or coercion of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or of any other person or persons?

It is further ordered that the questions of the application of the statute of limitations and all other questions of law which could have been raised prior to the framing of these issues and not passed upon by the court during the course of the trial on said issues, shall be reserved for future determination by the court upon motion of counsel for any of the parties hereto.

CHAS. C. COLE, *J.*

(Endorsement: *In re* estate of Geo. W. Utermehle, deceased. Issues filed Mar. 27, 1901. Louis A. Dent, register of wills, D. C.)

79 Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Will of GEORGE W. UTERMEHLE, Deceased. No. 3467, Adm. Docket 14.

This cause coming on to be heard it is ordered by the court that the caveator Charles H. Utermehle shall be plaintiff and that the

caveatees Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor Jr. and Mildred Taylor and Dorothy Taylor, infants, by Leroy M. Taylor Jr. their guardian *ad litem* shall be defendants in the trial of the issues in this cause: whereupon it is further ordered by the court, upon application of counsel for the defendants, counsel for plaintiff consenting that the trial of said issues be and it is hereby continued until Monday the 10th day of March A. D. 1902.

80 MONDAY, *April* 7, 1902.

CHARLES H. UTERMEHLE, Pl't'ff,
vs.
MAMIE E. NORMENT ET AL., Def'ts. } Probate. No. 3467.

Now again come here the parties aforesaid, in manner aforesaid and the same jury that was respited on Thursday last, who after the case is given them in charge on their oath say:

In answer to the first issue: Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property? They answer yes.

In answer to the second issue: Was the said Charles H. Utermehle, on the 27th day of September, 1900, estopped as against said Rosa M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of real estate? They answer yes.

In answer to the third issue: At the time of the execution by said George W. Utermehle of said paper-writing dated December seventh, 1887, as his last will and testament, was the said George W. Utermehle of sound and disposing mind and capable of executing a valid deed or contract? They answer yes.

In answer to the fourth issue: Was the execution of said paper-writing, dated December seventh 1887, by said George W. Utermehle, as his last will and testament, procured by the undue influence of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or any other person or persons? They answer no.

81 In answer to the fifth issue: Was the execution of said paper-writing, dated the seventh day of December, 1887, by George W. Utermehle, as his last will and testament, procured by the fraud of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or of any other person or persons? They answer no.

In answer to the sixth issue: Was the execution of said paper-writing, dated December seventh, 1887, by said George W. Utermehle, as his last will and testament, procured by the duress or coercion of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or of any other person or persons? They answer no.

(Endorsement; Geo. W. Utermehle, deceased. Minute. Filed Apr. 7, 1902. Louis A. Dent, register of wills, D. C.)

82 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467.

Now comes the caveator by his attorneys and moves the court to grant a new trial in the above-entitled cause on the following grounds:

First. The court erred in instructing the jury that they should answer the first issue framed on said caveat and pleadings in the affirmative.

Second. The court erred in instructing the jury that they should answer the second issue framed on the caveat and pleadings in the affirmative.

Third. The court erred in instructing the jury that they should answer the third issue framed on the caveat and pleadings in the affirmative.

Fourth. The court erred in instructing the jury that they should answer the fourth issue framed on the caveat and pleadings in the negative.

Fifth. The court erred in instructing the jury that they should answer the fifth issue framed on the caveat and pleading- in the negative.

Sixth. The court erred in instructing the jury that they should answer the sixth issue framed on the caveat and pleadings in the negative.

Seventh. The court erred in refusing to permit the caveator to proceed with his evidence on the several issues other than estoppel.

R. ROSS PERRY,
LAMBERT & BAKER,
Attorneys for Caveator.

(Endorsement: *In re* estate of George W. Utermehle, deceased. Motion for new trial. Filed Apr. 11, 1902. Louis A. Dent, register of wills, D. C.)

83 Supreme Court of the District of Columbia, Holding a Probate Court.

APRIL 28, 1902.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Thomas P. Woodward and made oath on the Holy Evangels of Almighty God that he is well acquainted with Milton C. Barnard, Wm. Redin Woodward and William R. Woodward; that he knows their handwritings, having often seen them write; that after examining the signatures Milton C. Barnard, Wm. Redin Woodward and William R. Woodward as that of subscribing

witnesses to the paper-writing purporting to be the last will and testament of George W. Utermehle, deceased, late of the District of Columbia, he declares the same to be in the handwritings of the said Milton C. Barnard, Wm. Redin Woodward and William R. Woodward respectively; and that it is well known to deponent that the said Milton C. Barnard and Wm. Redin Woodward have since departed this life and that the said William R. Woodward is physically incapacitated from paralysis to attend court.

Attest: LOUIS A. DENT,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

84 DISTRICT OF COLUMBIA, *To wit:*

On the 23rd day of April 1889 came Samuel Norment and Leroy M. Taylor and made oath on the Holy Evangels of Almighty God, that they do not know of any will or codicil of George W. Utermehle late of said District, deceased, other than the aforegoing instrument of writing, and that they received the same from Sarah Utermehle, the widow, therein named as executrix, after the same had been opened and read in the presence of the family of testator and said George W. Utermehle died on or about the 16th day of April 1889.

SAMUEL NORMENT.
LEROY M. TAYLOR.

Sworn to and subscribed before me.
[SEAL.] M. J. GRIFFITH,
Notary Public for the District of Columbia.

85 Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

APRIL 26TH, 1889.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Milton C. Barnard, Wm. Redin Woodward and Wm. R. Woodward, the subscribing witnesses to the foregoing last will and testament of George W. Utermehle, late of the District of Columbia, deceased, and severally made oath on the Holy Evangels of Almighty God, that they did see the testator therein named sign this will; that he published, pronounced, and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that their names as witnesses to the aforesaid will were signed in the presence and at the request of testator, and in the presence of one another.

Test: DORSEY CLAGETT,
Register of Wills.

86 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467.

This cause, coming on to be heard upon the several petitions filed herein, the caveats filed thereto, the several pleadings and proceedings in the cause, and the verdict of the jury upon the issues framed, which said verdict was rendered on the 7th day of April, A. D. 1902, and — motion for a new trial, it is, this 7th day of June, A. D. 1902, adjudged, ordered and decreed that said motion for a new trial be and the same is hereby overruled; and upon due proof of the execution of said will by the witnesses thereof, as a will of real estate, said will being dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, which will was heretofore admitted to probate and record in this court as a will of personal property on the 26th day of April, A. D. 1889; it is, this 7th day of June, A. D. 1902, ordered, adjudged and decreed that the said decree of this court dated the 26th day of April, A. D. 1889, which admitted said will to probate as a will of personalty, be, and the same is hereby confirmed; and it is further ordered, adjudged and decreed that said paper-writing dated the 7th day of December, A. D. 1887, be, and the same is hereby admitted to probate
87 and record as a will of real estate.

It is further ordered, adjudged and decreed that the caveator, Charles H. Utermehle, pay the costs that have been incurred in said proceedings by reason of the filing of the said caveats in this cause, and that the caveatees have execution therefore as at law.

JOB BARNARD, *Justice.*

From this decree the caveator appeals in open court, and the bond for said appeal, is hereby fixed at the sum of one hundred dollars ($100) for costs.

JOB BARNARD, *Justice.*

(Endorsement: *In re* estate of George W. Utermehle. Decree admitting will to probate and confirming former decree. Filed Jun 7, 1902. Louis A. Dent, register of wills, D. C., clerk of the probate court.)

88 OCT. 7, 1902.

CHARLES H. UTERMEHLE, Pl'tiff,
vs.
MAMIE E. NORMENT ET AL., Def'ts. } Probate. No. 3467.

Now comes here the plaintiff by his attorneys Messrs. Perry, Lambert, and Baker, and prays that the bill of exceptions heretofore submitted to the court, in this cause, may be signed, sealed and made a part of the record which is done accordingly, *nunc pro tunc.*

89 Filed Oct. 7, 1902. Louis A. Dent, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia.

In the Matter of the Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467, Administrations, Docket 14.

Be it remembered that the above-entitled case came on for trial on the 17th day of March, A. D. 1902, before Mr. Justice Barnard and a jury, and thereupon and after the said jury had been duly empanelled and sworn, the caveator, to maintain the issues on his part joined, gave in evidence the testimony of Mrs. NAOMI UTERMEHLE, who testified that she was sixty years old, born in Frederick county, Maryland, and first became acquainted with Charles H. Utermehle, the father of the caveator, the summer of 1860, and became engaged to him in the summer of 1861, at which time she was living in Frederick county with her parents, about three and a half miles from Frederick city; and that she met the alleged testator, George W. Utermehle, about two months before she was married. That she married the father of the caveator on the fifth of November, 1861, and met said George W. Utermehle in August or September, 1861—her husband brought him up to Frederick to meet her—and that he was the only one of the family she knew up to the marriage. That he visited her father for ten days, and that she saw him daily; that she was married at her father's house and then went on the wedding trip to New York and Philadelphia and came back to Washington and stopped at Mr. Utermehle's, on Massachusetts avenue, and remained there until the following August when she and her husband went to house-keeping at 359 Sixth street. That they returned from their wedding trip about two weeks after the marriage, and she remained at George W. Utermehle's from November,
1861 until the summer of 1862; that at that time the family of
90 George W. Utermehle consisted of the old gentleman, his wife and their three daughters, Mrs. Leroy M. Taylor, Nellie Utermehle and Mamie Utermehle (who is the present Mrs. Norment); that Mrs. Taylor's husband was away; that this was the first time she became acquainted with the Utermehle family; that Nellie Utermehle died in 1865, about the age of seventeen, unmarried; that Mamie Utermehle at that time was eleven or twelve years old; that the relationship between her husband's family and her husband and herself was very pleasant; that in August, 1862, they went to live at 359 Sixth street, where there were four houses in a row, and one of them was, according to the statement of George W. Utermehle, for each of his children, and that her husband was given his choice and he took 359. That she lived in the house a year and a half after her husband died. That Charles H. Utermehle, the caveator, was born in said house on the 2d day of July, 1865, and that he is the only living child of their marriage. That Charles H. Utermehle, witness's husband, was the only son of George W. Utermehle, and at

this time George W. Utermehle had the three daughters, heretofore mentioned, and Charles H. Utermehle, the husband of witness. That up to the time of the birth of Charles H. Utermehle, Jr., the relations between the families were pleasant and they visited each other; and that up to the birth of the child there was never any disagreement between the families; that Charles H. Utermehle, witness's husband, died on the fourth of January, 1867, and that the caveator was at that time eighteen months and two days old; and that in the summer of 1865 there was quite a good deal of misunderstanding between Mr. and Mrs. Utermehle, witness's husband's father and mother.

91 Here witness was stopped by an objection from counsel for the caveatees on the ground that the testimony was too remote. Mr. Worthington, of counsel for the caveatees, said: "We admit there were perfectly pleasant relations between the father and son down to the son's death." Mr. Perry, of counsel for the caveator, stated that not only did the caveator desire to show that the pleasant relations existed between the father of the caveator and his father but that on account of a certain disagreement between George W. Utermehle and his wife and the son's action in that case, the caveator desired to offer evidence to show that there was an extraordinary debt of gratitude from the father to the son which the father recognized at the time, and, in order to maintain this, offered to prove these services rendered on the part of his son, to which offer objection was made and sustained by the court and an exception noted. This disagreement occurred about 1865.

The witness first met Dr. Leroy M. Taylor in the fall of 1865, after George W. Utermehle had moved to Capitol Hill. That in 1865 George W. Utermehle moved on Capitol Hill to the house right back of Providence hospital where he died. That after Dr. Taylor returned, in 1865, witness's husband did not go to his father's house on Massachusetts avenue while he, Dr. Taylor, was there; that Dr. Taylor remained at Mr. Utermehle's house until June, 1865, when he went to live in one of the four houses in the same row with witness, and they (Dr. and Mrs. Taylor,) lived there until the next early fall and were there about a year, and then they went to live on the corner of Seventh and M streets, where they lived until Mr. Utermehle died, when they moved on Massachusetts avenue; that witness's husband did not go to his father's house while Dr. Taylor was there, but that immediately after he left, her husband renewed his visits.

92 Thereupon the following question was asked:

Q. What were the relations between Dr. Taylor and your husband?

Question objected to on the ground that it is wholly immaterial; and thereupon Mr. Perry stated that he proposed to show that Charles H. Utermehle, Sr. and Dr. Taylor did not speak to each other. The court sustained the objection to the question and offer, and counsel *to* the caveator excepted.

Thereupon the following question was asked:

Q. What were the relations between Mrs. Taylor and yourself after Dr. Taylor's return?

Mr. WORTHINGTON: Do you mean during this lady's husband's life?

Mr. PERRY: Yes.

Objection to question on the ground that it calls for immaterial testimony and is too remote. Objection sustained and exception noted.

Witness further testified that down to 1867 there were not any unpleasant relations between her father-in-law and herself; that her father-in-law came to see her on Saturday afternoon, the day of the funeral of her husband, but she did not see him, and he came Sunday afternoon. He came with his two brothers and a brother-in-law. He came again on Tuesday and asked for some letters; he said: "I want you to give me that package of letters that Charley said you might give me some time." That witness had no knowledge of the contents of the letters except from her husband; that they were in the top bureau drawer in her bed-room and were put there by her husband; that she handed George W. Utermehle the package and he said: "That package of papers there is mine too." (Referring to package of papers about the size of a long envelope.) That
93 witness did not know what the papers contained and handed him the package of papers and he took them and put them in his pocket. That George W. Utermehle was there at this time alone. That he called again on Thursday morning and said that witness's husband had died without making a will; and that it was her privilege to take out letters of administration but that if she did not he would. He then spoke of the Government bonds; he told witness that her husband had certain Government bonds belonging to him. That witness did not know anything about them but knew that the old gentleman had Government bonds, for in the summer of 1865, when there was a controversy between Mr. and Mrs. George W. Utermehle, Mrs. George W. Utermehle had left the city and took the Government bonds with her, she going at that time to witness's father's house in Maryland; witness's husband went and brought her there. That Mrs. Utermehle had with her a package of Government bonds; that in the fall of 1865, she saw George W. Utermehle with the same bonds, and Mrs. George W. Utermehle asked him what he was going to do with them, and he said: "Charley is going to give or get me the money for them." He then put them in a package and started out of the house. That witness did not know anything of the Government bonds down to her husband's death, and did not see them any more after she saw Mr. Utermehle go out with them; that after the death of her husband, Mr. Utermehle asked her about the bonds, saying, "Charley has my Government bonds;" and witness asked him why he did not say something about them, and he said: "That is all right, he has them." That on

Saturday morning of the same week, George W. Utermehle came and asked witness to give up her child; that at the time he demanded the bonds she told him she was perfectly willing to give him any
94 part of the bonds that belonged to her but she could not part with Charley's interest, and that she had no right to give up anything that belonged to her son, but he said he wanted them all. That on the Saturday morning when he asked for the little boy, witness said: "Mr. Utermehle, what would you do with him?" and he said "I would take him and raise him." Witness said: "What will I do?" and he said: "You can go home, you will marry again;" and witness said to him: "Mr. Utermehle, you will take from me everything." That same day witness went into court and took out letters of administration, and never saw George W. Utermehle to speak to but twice after that; that George W. Utermehle then replevied the bonds from the Metropolitan national bank; that she had no knowledge that her husband had any box in that bank until the replevin suit was brought. The replevin suit was compromised.

Here Mr. Perry offered to prove that during the trial in regard to the bonds, the witness saw a check for eighteen thousand dollars signed by her husband, which was a part of the money that was claimed to have been paid him for these bonds. Objection was made to the offer, objection was sustained and exception noted.

That witness saw George W. Utermehle in the court-room during the trial about the bonds in the spring of 1887, and that he did not speak to witness during the trial nor did witness speak to him. That witness saw him once again shortly after the trial on the occasion of the removal of her husband's body from the vault to Oak Hill cemetery. That he was there with Mrs. Taylor and that he did not speak to witness, nor did Mrs. Taylor speak to her on that occasion; and that witness did not see him for a long time, and that he never
95 spoke to witness either on that day or any other time thereafter; that she met him very seldom on the street but when she did he did not speak to her. That on one occasion, in 1876 or 1877, he brought the caveator to her door and that was the nearest he ever came to her house; and that from 1876 or 1877 to the time of his death in 1889, witness never saw him again; that the last time he was at witness's house was when he came in the morning before the removal of the body of her husband in response to a note written by her, which note failed to state the hour—he came to find out the hour. Witness remembers, however, that there was a little trouble between them afterwards in regard to a lot on M street, and that there was some sort of a trial in regard to it in Mr. Carusi's office, and that witness saw Mr. Utermehle there but he did not speak to her; that there were four notes for seven hundred and fifty dollars each secured on the M Street house and that there was a suit in regard to one of them, the other three being paid by witness and Mr. Carusi after her husband's death. That this seven hundred and fifty dollar note is the same note referred to in the will. The property was sold and the note paid in 1882. That Dr. Taylor never was in witness's house until the night before her husband died;

that about a month after her husband died notices were written by Mrs. Taylor in regard to the rent of the house. This was the first time rent was ever demanded. That a demand was made for from twenty-four hundred to twenty-seven hundred dollars, back rent; that witness refused to pay the rent and that legal steps were taken, and that she was threatened as she was given notice to quit; and they said, through Mr. Carusi, that she had better get out, and that in the fall of 1872 she moved out of the house. That at this time her little son was living with her and was not well. That witness mailed to
96 George W. Utermehle a letter from Dr. W. P. Johnson, stating that the caveator had the whooping cough and asked if Mr. Utermehle would not let her remain there until spring. That witness wrote the note and mailed it, postpaid, to George W. Utermehle on Capitol Hill and never received any answer to it. That witness waited a little while and was then notified that she would have to get out of the house or she would be put in the street. That when witness left the house on Sixth street she went on F between Sixth and Seventh and remained there two winters. In the summer she always returned to her parents in Frederick county, Maryland. That when moving from place to place she was always accompanied by her son, the caveator. That the caveator went to school when very young and that he continued at school for some time, he spending four and a half years at the school. He was seventeen years old when he left school. That Charley always went to see his grandparents from the time of his father's death, to the death of his grandfather and grandmother; that a colored man used to take him to see them. Sometimes the colored man would bring him home and sometimes they would send him home in a carriage, and one time he was brought home by his grandfather in a buggy. That after he got to be of some size he often stayed there all night, and when about eight or nine years old he very often went to see them on Friday or Saturday evening or Saturday morning and stayed until Sunday. That while he was going to school he used to do this nearly every week. That during all these years witness saw nothing of Mrs. Utermehle, the grandmother, and neither she nor Mrs. Taylor nor Mrs. Norment ever called at her house and she did not go to theirs, and that Mrs. Taylor never came to see Charley and he never went to her house, to her knowledge, nor did Mrs. Norment ever call on Charley although she remained at her
97 father's home until her marriage. That at Christmas Charley would be given a Christmas present by Mr. Utermehle; he would generally bring home a gold piece. That George W. Utermehle could speak English but he could not write it; that witness never saw him writing English. That Charley's visits to his grandfather's house were about once a week when he was a little fellow. That since her husband's death witness has lived in Washington and has been in Washington nearly all the time except on two or three occasions she rented her house for six months and went out of the city, and that every summer she would go to the country and stay there the greater part of the summer, and would

be in the city from September to the following June or July. That when she was boarding she would spend four or five months in Washington and would spend the rest of the time in the country. That on one occasion she met Mrs. Taylor and Mrs. Norment at Mrs. Hoeke's but that they did not speak; also met them at Mrs. Du Bant's and they did not speak.

Thereupon witness was asked the following question:

Q. Do you know of any trouble that George W. Utermehle had with his daughter, Mrs. Taylor, during his lifetime?

The question was changed by limiting it to "prior to the death of your husband?"

Objection was made on the ground that it was too remote; objection sustained and exception noted.

Thereupon witness was asked the following question:

Whether she ever heard Mr. George W. Utermehle make any threat against Mrs. Taylor, the question being limited to the time prior to Charles H. Utermehle's death. Objection on the ground that it is too remote and irrelevant; objection sustained and exception noted.

98 Thereupon Mr. Perry dictated to the stenographer the following offer: "I offer to prove that George W. Utermehle said to Mrs. Taylor in the presence of the witness shortly before her husband's death that if she did not keep her damned mouth shut he would kill her." Offer objected to, objection sustained and exception noted.

Q. State whether or not, prior to your husband's death, you ever heard George W. Utermehle speak of his feelings towards Leroy M. Taylor, his son-in-law.

Same objection, objection sustained and exception noted.

Thereupon Mr. Perry made the following offer: "I offer to prove by this witness that in her presence George W. Utermehle would walk around the house and curse Dr. Taylor. This was prior to the death of witness's husband.

Objection to offer, objection sustained and exception noted.

Witness was then asked when, if at all, did she first notice any habit of drinking to excess on the part of Mr. George W. Utermehle. She replied that he always drank; he always drank every morning; he drank early in the morning and he drank two or three times after that a day; that she noticed that he drank, as she supposed, a great deal. He would always take a drink before breakfast. She recollects this when she resided at the house; he would go to the sideboard and take a drink; and that she continued to see a good deal of him down to 1867 when her husband died, and she noticed that he always drank. He always kept it and always took pretty good drinks, and that whenever she went to the house he always drank, but she is unable to testify at all as to his habits from 1867 on. That she did not think herself competent to express an opinion

as to his mental condition. That Mrs. Norment always re-
99 membered Charley at Christmas time and gave him a nice book or some other present. That she continued this from the death of his father until three or four years before his grandmother died; that after he was married she would give him some money for his little children. That Mrs. Taylor never gave him anything at all. That in 1868 the income of witness was about sixty dollars per month, and it continued until quite recently.

Thereupon witness was asked the following question: Whether after her husband's death any contribution towards Charley's education and maintenance was made by Mrs. Taylor or by Mrs. Norment.

Question objected to, objection sustained and exception noted.

Witness further testified that she knew Seth A. Terry of this city and went to see him in the fall of 1899 or early in 1900 in answer to a note that he wrote; the note was dated Washington city, D. C., April 11, 1900. The witness called on Mr. Terry and Mr. Terry said: "Why, Mrs. Utermehle, I ought to know you." Witness said: "Is that so?" And he said: "Yes, you know we had about seven thousand dollars of your money for quite a number of years." Thereupon witness said: "Is that so." And he said: "Yes, your father-in-law loaned it to us for a little church and asked interest monthly, as he said it was part of your living; that he had to have it promptly because it was part of your living."

That witness told Charley about it and Charley went to see Mr. Terry; that, in point of fact, George W. Utermehle did not have said seven thousand dollars nor any money of witness and did not make any payments monthly to witness. That after her son called to see Mr. Terry the witness saw Mr. Lambert and placed the matter in his hands.

100 *On cross-examination* witness testified that the conversation with Mr. Utermehle about taking the boy to live with him was in the presence of her mother who is now dead, and that when he called later and talked about the bonds no one was there but herself. That a controversy over the seven hundred and fifty dollar note took place in the fall of 1882, and that Mr. Eugene Carusi represented witness. That they were at Mr. Carusi's office possibly an hour, in the same room with Mr. Utermehle, and there was some controversy and argument about the note. Mr. A. A. Wilson was present. There was quite a good deal of controversy between the parties, Mr. Utermehle taking part. Mr. Carusi asked him why he had not produced the note long ago or presented it when he settled the estate, and he acknowledged to Mr. Carusi that he took the note out of her husband's box in the bank. At the time his face was very red but witness could not tell whether he was very drunk or very sober. Could not say that he was drunk. That the caveator visited his grandfather up to the time of his death, and that the caveator lived in Washington until 1883, and that in 1883 he was about eighteen years of age, and that he continued to make

visits to the house weekly until 1883 at which time he went to Frederick. He went there in the beginning of 1883, and witness continued to live in Washington, but sometime the caveator would come down and stay two or three months at a time, and he would be with witness during the winter the greater part of the time. He was married in the beginning of 1884. And after he went to Frederick he was in Washington several times, but witness could not say how often; that he might have been for the greater part of the winter in 1886 or 1887 with his wife; that the caveator was with her a
101 great deal that winter and that during the winter of 1886 or 1887, while he was in Washington, he went to see his grandfather; used to go right often, possibly once a week; that he would say where he was going and take his wife and baby with him and would go out. That during the winter of 1886 or 1887, as far as she knows, he saw a good deal of his grandfather. That so far as witness knows the relationship between the caveator and his grandfather was pleasant. That he would on these visits go at lunch time and take lunch and stay till late in the afternoon; that he knew that his grandfather was always drinking but she could not remember whether he ever said he was drunk or not. That during the winter of 1884, instead of 1883, witness was not in the city of Washington but was at the City hotel in Frederick for three months and then went to Charleston, South Carolina.

On redirect examination witness testified that Mr. Utermehle was, as a rule, always a drinking man, and at times when he drank a little more than was usual he was very morose and cross, but she could not say what his condition was at Mr. Carusi's office; he was speaking there and had quite a good deal to say and seemed to be quite irritable. That she never followed her son to visit his grandfather and does not know how often he went there.

102 And next, thereupon, the caveator, further to maintain the issues on his part joined, was sworn as a witness in the case and testified as follows: That his name is Charles H. Utermehle and he at present resides at 1132 Twelfth street, in the city of Washington; has no recollection of his father and the first remembrance he has of his father's relatives was when he was five or six years old. He remembers going over to Capitol Hill to see them at a place immediately back of Providence hospital; the family at that time consisted of his grandfather, grandmother and aunt who is now Mrs. Norment; that Mrs. Taylor did not live at home at that time. His first recollection of Mrs. Taylor is when she was living at the corner of Seventh and M streets, northwest; that he was at her house possibly once or twice in his life; went there with his grandfather on one occasion and again went there to meet him to go over to the hill with him; that he was possibly in the house only once in his life; that before he went to Frederick he usually went to see his grandfather once a week, sometimes oftener. That when he was small a colored man took him over to the house and when he got older he went by himself; he would frequently go on Friday and stay until

Sunday evening or sometimes until Monday morning, and he kept this up until he went to Frederick to live. That in 1882 he was in Frederick quite a while. His uncle died in November of that year (his mother's brother), and after that he was back and forth between Frederick and Washington until May 13, 1883, when he went to Frederick to live; that he had up to this time always been treated pleasantly, extremely pleasantly by his grandfather; that his grandfather never talked much to him nor to any one else. His grandmother used to talk a good deal,
and when he first went over there he remembers that. His
103 grandfather had very little to say but as he, witness, grew up
he used to be more with him and on many occasions rode around the city with him and went with him to the oyster wharf on Saturdays where he would go for oysters and would bring them home. Witness was very fond of the country and liked it at his grandfather's place very much. His grandfather was extremely pleasant to him but had his own peculiar ways, of course. That when he went to his grandfather's on Friday it was generally after three o'clock, after school. That when young he very seldom went over there until Saturday. That he would usually see his grandfather and grandmother and Mrs. Norment until her marriage; that he doesn't think he went over to the house to stay all night before Mrs. Norment's marriage, she being married, to the best of witness's recollection, in the early seventies—in September, 1873. That at this time witness was a little over eight years of age; that he did not commence to stay there from Friday until Monday until he was ten or twelve or, maybe, thirteen or fourteen years old. That besides the members of the family they had a white woman who was like a housekeeper and, at one time, they had two there. That he slept in a spare room adjoining his grandmother's and grandfather's room; that when he was there in the afternoon he generally found his grandfather sitting on the porch if it was in early spring or fall, or walking around the place, but in the winter time he would be in the sitting-room; that they had dinner in the middle of the day and tea in the evening and that he would on these evenings take tea with his grandfather and after supper they often played dominoes, that is, his grandfather and himself, and would retire about eight or nine o'clock. Witness would get up reasonably early but his
grandfather was generally up before him; would get up some-
104 where about six o'clock. They had breakfast at about seven.
He would start downtown about seven or half past seven and he would often go to market before getting into the city, and on several occasions witness went to market with him. This occurred about five or six times, and then they would go back together; that witness would stay there all day; that in winter time on afternoons they generally went to the Eleventh Street oyster wharf and would walk. That on Sunday witness would be around the place with his grandfather; his grandmother would go to church on Sunday morning, and on Sunday afternoon, as a rule, Dr. and Mrs. Taylor came over. They would either take dinner or get over in time for tea

and then they would go back that night. That, as a rule, witness left Sunday evening about four or five o'clock, but sometimes would stay to supper and sometimes all night. That this continued up to the time that witness went to Frederick; that he was always treated nicely by his grandmother—she would talk to him much more than his grandfather, she would ask him how he was getting along and about his school. That on one occasion, before witness was eighteen, his grandfather took him in his buggy; this was about 1877 in the fall.

Thereupon he was asked the following question:

Q. Now, Mr. Utermehle, just tell us in your own way and as fully as you can what your grandfather said to you on that occasion; in the first place how did you happen to go in his buggy? You say, this was on the occasion when he took you home in the buggy? How did he happen to do it on this occasion?

Mr. WORTHINGTON: Mr. Utermehle, please do not state any conversation; you can state the preliminaries and so on, but when we come to conversation I want to object.

105 A. I did not know that there were any preliminaries to the matter, it was simply a conversation.

Mr. PERRY: Well how did you happen to go in the buggy?

A. He said: "I am going uptown this afternoon and I will take you in when you go."

Thereupon, upon request, Mr. Perry reduced to writing what he expected to prove in answer to the last question as well as other questions to be put to the witness. The following offer was made: "We expect to prove the testamentary declarations of George W. Utermehle in 1877. We expect to follow that up by proof as to another declaration about the same intentions in 1882. Then we propose to offer the testimony of another witness as to a time somewhere between 1882 and the time of the testator's death, so it is not simply the declarations in 1877 that we expect to prove in answer to this question; but we expect to show a purpose of mind formed at that time and adhered to up to near the time of the death of the said George W. Utermehle."

To which question asked aforesaid and the statement counsel for the caveatees objected; the court sustained the objection and counsel for the caveator excepted.

And thereupon, to keep the record in proper shape, counsel asked the following question:

Q. Mr. Utermehle, recurring to your testimony given day before yesterday as to the incident in 1877, when your grandfather took you from his house to your house in his buggy, have you it in mind now? A. Yes, sir.

Q. I will ask you whether or not you had any conversation with your grandfather on that occasion. A. Yes.

106 Q. I will ask you whether or not he made any statement to you on that occasion. A. Yes, sir.

Q. I will ask you to state whether or not on that occasion your grandfather said anything to you with reference to a suit that was then pending in this court brought by his sisters and others against himself, to which you were defendant.

Mr. WORTHINGTON: I object to the question as to anything said about that suit on the ground that it is incompetent.

Mr. PERRY: It is simply introductory to the making of the offer—is the objection sustained?

The COURT: Yes.

Mr. PERRY: I except to that on the ground that the answer to the question would be merely preliminary to the main point.

The COURT: I thought that was the question; he said something about that; that is all proper enough.

Q. Answer that question, please, Mr. Utermehle.

(The question was read and witness answered he did.)

Q. I will ask you what he said with reference to that suit.

Mr. WORTHINGTON: I object on the ground that it is irrelevant, incompetent and hearsay.

The COURT: I will sustain the objection to that.

Mr. PERRY: I except on the ground that the answer would be merely introductory to the main conversation about which I proposed to ask him.

Mr. WORTHINGTON: I submit that at this point he ought to state what he expects to show and that will make the record correct.

The COURT: Yes.

107 Mr. PERRY: I will dictate it to the stenographer.

Mr. Perry then dictated to the stenographer as follows:

I offer to prove by this witness here upon the stand, duly sworn, the following facts: On that occasion a suit had been brought in the supreme court of the District of Columbia by the sisters of George W. Utermehle against himself and others, as defendant, claiming that he had fraudulently disposed of certain property for which he was trustee under his father's will and in which his sisters had an interest; that the witness, Charles H. Utermehle, Jr., was a party defendant to the said suit; that on the said occasion and during the said ride in the said buggy, George W. Utermehle expressed to the witness, his grandson, great anxiety about the suit and requested him, the witness, not to have anything to do with the suit, and then and there told him that if he would refuse to have anything to do with the suit, he, the grandfather, George W. Utermehle, when he came to make his will, would leave him an equal share with his daughters of his estate.

The COURT: Is that in the character of the declaration I anticipated in my ruling?

Mr. WORTHINGTON: Yes, your honor; it is the same thing. I want to say, while it is perhaps unnecessary——

Mr. PERRY: Are you entering your objection now?

Mr. WORTHINGTON: I am entering another objection. The court

has ruled one objection good enough, but in order to have the record straight, if the question shall arise, I want to place upon record an objection to that testimony upon the section in the code which prohibits, when one of the parties is dead, the survivor from testifying. I have forgotten the exact language of it.

108 Mr. PERRY: I want to state the reasons for which I offer this, the aspects under which we offer it. We offer it, first, as showing the disposition and feeling at that time of the testator towards his grandson. We offer it, secondly, as in the nature of a contract on the part of the grandfather with the grandson, that if he would take a certain line of action at one time, the grandfather would do a certain thing in consideration of it. We offer it, thirdly, as showing what the testamentary intentions of the testator were at that time in connection with his sanity. We offer it under the issue of testamentary capacity as showing what his testamentary intentions were at a time when I believe there has been no intimation in this case he was not of unsound mind.

Mr. WORTHINGTON: You make no claim that at that time he was of unsound mind, as I understand it.

Mr. PERRY: Not as I am advised at present, if your honor pleases. There was one statement made by Mr. Worthington, in his opening, which, if he follows it up by proof, might raise some question about that. Having in mind the proof that I am advised we can offer, if what he says he can offer is correct, it might raise some serious question as to his condition of mind at that time.

Mr. WORTHINGTON: The section of the code under which I make the last objection is section 1064.

Mr. PERRY: Now, I am going to follow that up with this question. Do not answer it, Mr. Utermehle, until the court rules on it.

Q. State whether or not in the considerations of the statements made to you in this conversation, which the court has ruled out, by your grandfather, you pursued a certain line of conduct.

109 Objection to question; and, thereupon, Mr. Perry made the following statement: I offer to prove by this witness that he accepted the promise made by his grandfather to him in that connection and in point of fact did not have anything to do with the suit otherwise than as a nominal party defendant thereto.

The court sustained the objection to the question and the offer of proof and counsel for the caveator excepted.

Q. Now, Mr. Utermehle, I want to depart from the regular order of the examination where we were yesterday and go back to your examination day before yesterday, in connection with this particular subject. State whether or not on any occasion after 1877 you had a conversation with your grandfather of the same general nature and purport as this one you had in the buggy in 1877? A. Yes.

Q. What were the circumstances under which you had that conversation? A. The conversation was first broached in the early eighties.

Q. What do you mean by the early eighties? A. Eighty-one or eighty-two.

Q. Did you have more than one such conversation with him in the early eighties? A. We had two or three conversations on the same subject of that kind.

Q. Of the same general purport? A. Of the same general purport; yes, sir.

Q. When was the first of them? A. I presume the first of them was in the latter part of 1881; I am not positive but I think so. That is my best recollection.

110 Q. Do not state anything he said to you about this subject; we simply want to get the situation when the statements were made. A. I spoke to him about my mother's intention to either improve or dispose of the vacant lot she owned on M street.

Mr. WORTHINGTON: I object to all of this. It seems to me that it is impossible for him to give any particular conversation without possibility of injury.

The COURT: It is incompetent for him to state what he said to his grandfather.

Mr. PERRY: Very well, I will make my offer now if the court thinks it is proper.

The COURT: Yes.

(Mr. Perry then dictated to the stenographer as follows: It is offered to prove by the witness that in 1881, the latter part of the year, the testator, George W. Utermehle, said to his grandson, when the grandson, Charles H. Utermehle, Jr., the witness, had spoken to him with reference to his mother's intention to make some improvements upon a certain lot of ground that she owned in this city, that he, George W. Utermehle, had a deed of trust upon this said lot, and that the witness had better advise his mother not to make any improvements upon it; and then went on to say that the witness, Charles H. Utermehle, Jr., need take no care about his future, as he, the testator, intended to provide for him equally with his other children.)

Mr. WORTHINGTON: I think counsel will agree that is in the same line covered by your honor's ruling.

Mr. PERRY: Yes, sir, your honor rules it out and we except. Before your honor makes that ruling, however, I will make this
111 statement: This will was made in 1887. This conversation we are now dealing with was made in the latter part of 1881, and we offer it especially now under the issue of testamentary capacity, in order to show what the testator's testamentary intentions were at the time when he may be claimed to have been sane.

The COURT: I make the same ruling. It is the same situation, except that you come nearer the period when the will was made.

Mr. PERRY: I note an exception.

Q. When was the next conversation you had with your grandfather about this same subject we are speaking of and which the court is ruling on? A. I think the last conversation we had on that line was shortly before I went to Frederick.

Witness thinks the conversation occurred after New Year in 1883.

Mr. Perry then dictated to the stenographer as follows: It is offered to be proved by the witness upon the stand that again, in the early part of 1883, the testator, George W. Utermehle, at his house in this city, referring to the general subject of the two preceding conversations, again stated to the witness that he intended, when he made his will, to give the witness his, the witness's father's share of his estate; to which offer counsel for the caveatees objected, the court sustained the objection and counsel for the caveator excepted.

Witness further testified that Dr. and Mrs. Taylor treated him as they would any other person at their house, as a person calling there, talked with him sometimes but nothing more than that. They always called witness by his first name. That on the occasion
112 of these visits Dr. and Mrs. Taylor talked with the grandfather; their talk was almost always about business—some rent or something of the kind, something about a tenant that had not paid his rent or something about making repairs on property; made suggestions to Mr. Utermehle that it would be well to do so and so in the way of repair or in reference to a loan; that up to the time of May 13, 1883, when witness went to Frederick, he noticed that his grandfather at times had taken a drink, that he kept the liquor in a room at the house, and that he saw him once or twice go there and get a drink and then go in his room. Witness has seen him walk to the pump, get a pitcher of water, go into the room or private room something like a store-room. He would go in there and get the drink, and he asked witness on many occasions to go with him, but witness did not go with him at that time. That he had asked witness to take a drink but up to this time, when witness was eighteen years of age, he did not take a drink with him. That up to the time of his going to Frederick to live permanently, except when he was away from the city in the summer, witness would go to see his grandfather once a week. In the year 1883, before witness went to Frederick to live permanently, he saw very little of his grandfather because he was back and forth from Frederick all the time, and that really he was not regularly in Washington from June or July, 1882. That witness formed an impression as a child that his grandfather was a person who took a drink when he wanted to, that it was a regular thing in the morning for him to take a drink. He generally took the drink before breakfast; witness knew he took a drink, and witness has taken a drink with him at that time. That witness did not notice anything particular about the progress of the drinking habit of his grandfather up to 1882, that he could not testify as to what his condition was then as to drinking.
113 That from May, 1883 until the 7th of December, 1887, he was in Frederick county most all the time with the exception of about four or five months in the early part of 1887. That he thinks he was not in Washington during the year 1884, but if he was it was merely for a day or so. In the year 1885 he does not think he was

in Washington at all more than possibly a day or so at a time, which was very seldom. In winter time of 1885 witness may have been in city but is not sure for three weeks or a month or two off and on. That witness saw his grandfather when he lived in Frederick once about the 8th of February, 1884. He was then nineteen years of age. He fixes the date because he was married on the 5th of February, 1884. He came to Washington on his wedding trip and made a visit of possibly an hour at his grandfather's house. He does not recollect any other occasion in 1884 that he visited his grandfather. And when he and his wife called they talked with his grandfather; that they were in the parlor and that the grandfather came in a few minutes and then went out. Witness has no distinct recollection of how long he was in Washington during the year 1885, but may possibly have been in Washington during the winter of 1885–1886, but he has no recollection of seeing his grandfather in 1885. He may have seen him once or twice in 1886. He was there at Christmas, 1886. He never stayed all night at the house after he left for Frederick, and witness has no recollection as to the condition of his grandfather in respect to drunkenness in the year 1886. That according to his best recollection, in the year 1887 he saw his grandfather possibly a half a dozen times at his house, not meeting him anywhere else. He would go there for a short while, possibly an hour or two or something of that
114 kind, possibly to take dinner. Witness was in Washington in the year 1887 for several months, came in the month of February and left in June or July, and was then back once or twice until the Christmas holidays, but then only for a few hours like between trains. That he took Christmas dinner with his grandfather in 1887, his wife accompanying him. That they went there about eleven o'clock and remained until five or six, having dinner about one o'clock or between one and two. That on this day his grandfather drank quite a few drinks, he taking a drink with witness that day. That his grandfather on that day appeared to be under the influence of liquor. That prior to this time witness had taken one or two drinks with him. That about the first drink of whisky witness ever took was with his grandfather at his invitation, when he was nineteen or twenty or twenty-one years of age. It was on a holiday, possibly Christmas, and before 1887. That on the Christmas of 1887 his grandfather seemed rather disagreeable, that is out of sorts, and he retired rather early in the day, possibly an hour or two after dinner, and he was not active as he generally was; and that evening when they were at supper he started to come down stairs; they heard him apparently, and the girl or woman went out in the hall and got him and took him back upstairs. That nobody else was upstairs that witness knew of and witness saw him at the bottom of the stairs with his night clothes on. Witness was sitting in a chair that gave him an opportunity to look straight out in the hall and he could see his grandfather in his night clothes. He appeared to be under the influence of liquor on that day. Witness cannot say that he ever considered his grandfather under

the influence of liquor to the extent that he could not exactly take care of himself or know what he was doing, but on this occasion he had the appearance of drinking, more so than any other time during the whole year. The name of the woman who took him upstairs was Louisa Smith; that at this time witness was living in Frederick and was down in Washington for a month or two in the winter. In 1888, witness was living in Frederick county and was in Washington very seldom—possibly two or three times a year until the winter time; and during this period, witness has no recollection of seeing his grandfather. In January and February of 1886 witness came to Washington, and from January 1888 to January 1889, possibly he saw his grandfather four or five times. In November or December, 1888, he came to Washington and was back and forth between Frederick and Washington several times possibly in each month and from then on until after his grandfather's death. That witness's wife was living at this time on 12th stre-t with his mother, but witness's business was in Frederick. That his grandfather died April 16, 1889, and that during the months January, February and March, 1889, he went over to see him, possibly once a month. He found him generally lying on the sofa or sitting there. Witness thought him in failing health. He seemed to be rather feeble, stooped in his walk, trembling in his walk, and seemed to have lost all interest in business. Witness was present when he died. He was over there several times each day possibly within two or three days before his death. During his final illness, he was confined to his bed not very long, that is entirely confined to his bed, possibly less than a month. That from December, 1887, to the time of his death, witness never saw him in the city at all. Witness cannot say as to whether or not he noticed whether from December 1887 up to the time of his death his grandfather was under the influence of liquor. Witness knows that he took a drink or two with him most every time he went there. His grandfather wanted him to take a drink with him, and that his grandfather would take a drink before meals or something like that. That each time witness was over there in 1887, his grandfather would invite him to take a drink with him. That witness did not see his grandfather sufficiently often from 1883 until the time of his death to be able to give his opinion about his mental capacity, and that he does not express any opinion. That from personal knowledge he had of his grandfather as to his mental capacity to the time of his death, he expresses no opinion. That witness was educated by a Mr. Flynn and went also to the Emerson Institute up to about 1879. That he left school, he presumes, in 1878 or 1879, he is not positive; but continued thereafter to go to Mr. Flynn and did not leave him until possibly some time in 1882, when his uncle died and his mother had some interests in Frederick; and they went up to Frederick to look after them. In Frederick witness ran the lime kilns, which his uncle owned before his death, until 1884 when he went on the farm that his mother purchased. He ran this farm and continued to run it until 1889.

That in 1887, for about five months, he was in Washington in the real-estate business, and was away from Frederick in the winters. That he did not run the hotel in Frederick until 1895 on October 21st. He left the farm in 1887 and came to Washington for about five months, but still had the farm and was connected with Maj. S. D. Newcomb, in the real-estate business in Washington. The firm continued until possibly August or September and then he went back on the farm in June or July, 1887. That he remained exclusively on the farm until 1893 or 1894, and continued to run it until 1899. That from 1884 for some time he was dealing in horses in connection with the farm and that he was going to Washington in the winter time on the horse-dealing business. That he took the hotel in 1895 and he continued to run it until June, 1898; that he left Frederick in November 1899, and came to Washington, and since that time he has lived in Washington with the
117 exception of two or three days and possibly not over a week, that he has been in Frederick. That while in the real-estate business in Washington he went to his grandfather to get some plate-glass insurance from him; this is the only business he asked him for, and he gave him that. This was in the early summer or late spring—in May or June, 1887. That on this occasion he noticed that his grandfather was failing in health. That he first called to see him possibly in March, 1887. That he seemed to lack energy, was trembling and walked more stooped than he had seen him during the years previous to that time; he did not seem to be active or come to town much. That witness went over to see him on one or two occasions about the insurance, and went there about noon, and always found him home. As a rule, previous to that, he never got home until 12 or 12.30 or 1 o'clock; he seemed to walk in a trembling way and he stooped more, and when he walked his knees would tremble. He did not notice any other part of his body tremble. He walked stooped, was a rather tall man, and he seemed to be rather irritable, but witness did not pay any special attention to that. He talked very little that time and at dinner on several occasions at that time when some conversations would occur at the table between his grandmother and grandfather, witness was not able to understand him, because he was talking German, and seemed to get very excited. As soon as the conversation would get started he would talk in the German language. He seemed to get excited very quickly, and when he was reading the papers witness noticed on one or two occasions that he got excited about something that he read. He would manifest his excitement by talking about what he saw in the paper, of outrages he saw in the paper, or something in that way. Witness cannot give the
118 style of language as he would generally talk in German. He, the alleged testator, would sometimes be cursing. He had a peculiar kind of cursing of his own. He would get up and walk around and pull his hair, or rather his wig, and on one or two occasions he pulled it off. The only source of knowledge that witness had of him in the way of his drinking, or style of his drinking, was

that he kept his whiskey in his room about which witness has explained, and he would go there, and on every occasion that witness took a drink with him, he, alleged testator, took a very large drink. He would take a goblet, possibly nearly half full of whiskey, and pour some water in it. It was one of these narrow rather thin goblets and he would take it about half full. Witness did not notice his driving during the years of 1886 or 1887, but had noticed it previous to that time as he had driven with him. He drove in a low-down rockaway that would hold two persons. It had curtains down at side and back. That witness got rather afraid to ride with him because he did not drive with any care; he was liable to run over somebody or somebody was liable to run into him. He would sit in the vehicle and hold the reins and let the horse go along one way or the other. The horse he drove in the latter years of his life, he bought down at an auction, when witness was with him. In fact, witness thinks he was present when he bought the last two horses. He bought one horse down at Cook's on E street, between 12th and 13th, which he said was too slow for him, and one day while witness was riding with him down Pennsylvania avenue, he stopped and bought a horse at auction. He bought the horse, wagon and harness at Ratcliff's. The horse was rather an active horse and required some care in driving, and witness did not like to ride with him when he drove that horse because he would turn
the corner and if there were any children in his way, they
119 would have to get out of his way. Witness never knew his
grandfather to get out of their way. Witness has never seen his grandfather in a carriage, except when he was with him on one or two occasions, but witness has seen him go out in the morning when he would remain with his grandmother, when he had some sand or mortar or something of that kind in the carriage; that witness has seen a colored man with him named William; he attended the horse and around the place.

In answer to a question of, do you know just where he attended to his business, witness answered: "I have seen him frequently at Seventh and M streets. I have seen his buggy there in the morning, or about noon, if I happened to be going up there."

Witness further testified that Dr. and Mrs. Taylor lived at Seventh and M streets, where he used to see his grandfather's buggy. During the last eighteen months of his grandfather's life, from what witness saw of him, witness thought he was getting feeble. As to his physical condition, witness noticed that he was very much weaker and more decrepid; and as to his mental condition, when witness went over there on the occasion to get the insurance and spoke to him, he said: "All right, you write these policies and bring them over here." At that time he talked to him in regard to what he was doing in the real-estate business, and all he said to him then was, "I have a piece of property over here in the country; if you can sell it, sell it." He seemed anxious to get rid of it. This was 27 acres on Queen's Chapel road. It is the property now known as the Lutheran National Home. In the summer of 1887 was

when he said he would take $5,000 for it. Witness has no personal knowledge of the manner in which they had to treat his grandfather at his home, but he noticed the latter part of his life that he was not about much. That during the latter
120 part of his life Louisa Smith was at the house and she remained there until after his death. That witness possibly saw him on one or two occasions, or perhaps oftener, during the latter part of his life, on the street, and then somebody was with him. The last time witness saw him on the street in the city of Washington was with the colored man. Witness did not know of his attending to any business from December, 1887, until the time of his death. That witness was not in Washington much from the time he went to Frederick in 1882 up to 1887, but prior to 1882 he remembers seeing his grandfather around collecting his rents. That his grandfather always made him presents at Christmas whenever he was there; to the best of witness' recollection, his grandfather gave him a hundred dollars Christmas, 1887; anyhow, $50. He always gave him a Christmas present when he went there Christmas. His grandmother always gave him a Christmas present when he went there at Christmas, and very frequently, in fact most always when he was a boy. Mrs. Norment always gave him a present at Christmas until his children were born, and then she gave it to them. That Dr. and Mrs. Taylor never gave him any presents. That he never visited Dr. and Mrs. Taylor except that he has a recollection of being there on one occasion when he went with his grandmother. He was possibly eight or ten or twelve years old; and again on another occasion he went there to meet his grandfather to go out home with him. That while his grandfather was confined to his bed for comparatively a short time before his death, he was expected to die before he actually died. That in the conversation at the table on Christmas of 1888, there was surprise expressed that his grandfather was there for this Christmas. Witness thinks that Dr. Reyburn attended him during his last illness. He died
121 noon, and Mrs. Taylor seemed to have taken charge of the funeral arrangements. That his mother was not invited to the funeral, but witness was at the funeral which took place at Congressional cemetery about three or four o'clock in the day. That after the funeral all came back to the house and the will was read. Everybody went into the parlor; that witness and his wife went in a carriage to go to the funeral, with whom else witness does not remember. Witness thinks Mrs. Taylor told him to come back to the house. That they were there—all the family, grandmother, Dr. and Mrs. Taylor, Mr. and Mrs. Norment, witness's wife and himself, and Mr. William R. Woodward, the old gentleman who drew the will. That immediately after the will was read there seemed nothing more to do, and witness immediately left; he heard the contents of the will but did not say a word to a soul. Mrs. Taylor said: "You come over tomorrow." The next day witness went over to his grandmother's or grandfather's house, possibly about ten or eleven o'clock, and went into the dining-room, and there was there Mrs. Taylor, Mrs.

Norment and the grandmother. Witness was not able to say who let him in the house, as when the door was opened he walked into the dining-room and saw there the three persons mentioned. Mrs. Taylor did the talking entirely. They were all sitting around the dining-room table. Witness was not sure who began the conversation but possibly Mrs. Taylor. Mrs. Taylor started the conversation by saying that the will had virtually cut witness off, and that if it had not been for her or the Doctor, that it was through their persuasion that he had been left this property at Sixth and Louisiana avenue; that they had his grandfather paint it and put it in repair so that when it came into his possession it would not be any expense to him to put
122 it in condition at the time; that his grandmother was left all the personal property, which amounted to almost if not quite equal to what they had received; and that when she died she proposed to make him right, to make him equal with them by equalizing his share; and further, that she wanted to know what the mortgage on his farm was; that she understood there was a mortgage on his farm, and that she wanted to pay it off. She wanted to start him out without any debt on it. His grandmother was sitting there at the time; they were all sitting together. Then when Mrs. Taylor made these remarks, his grandmother did not say a word. There was not anything said. He was asked what the mortgage was on his farm and told them $11,500. Mrs. Taylor asked it, and she said, "Ma wants to pay that mortgage off," and so forth. Mrs. Utermehle, the grandmother, simply smiled and acquiesced. She did not say a word. There was not a word said by anybody at all except Mrs. Taylor and himself. The only remark that he made was what the mortgage on the farm was. They were all there sitting at the table; they were very close together. It was one of those tables made short for the accommodation of the family, that could be made longer; it usually seated four or five people at the outside. This was in the dining-room of the house, which was really the living-room. The house is in the center of the square and it faces Second street. The room in which they were faced east, that is, there were two windows on the east side of the room and one window on the west side of it. One window looked towards Second street and two windows looked back towards the stable which was on Third street. Witness does not recollect just where the parties were sitting. He was either at the table or on the sofa. At the furthest, witness was not more than six
123 feet from the table and the others were sitting possibly at the table right close together or around the room. The room was not an extremely large one. When the table was enlarged for the Christmas dinner, there was not much room at both ends of the table. There was space to go around. Mrs. Taylor spoke in her usual tones, and Mrs. Utermehle smiled and nodded, and she made one remark; she said: "Yes, I want to pay your mortgage; I want to know what it is." That was the time the question was asked about the mortgage. This was after Mrs. Taylor said her mother was going to equalize witness with the others. Witness's grand-

mother said, speaking of the mortgage, "I will fix that up for you right away."

Witness was then asked this question:

Q. I will ask you whether or not you believed what was then said to you as to what your grandmother would do when she made her will. A. I did.

Q. Did you or not, have any doubt about it at that time? A. None whatever.

Witness further testified that the interview was not very long, possibly three-fourths of an hour or an hour. Witness was, at that time, 23 years old. That no money was given him then nor on that day. Witness recollects that his grandmother said she would give him a check for the mortgage in a few days, and witness then went home.

Witness was then asked the following question:

Q. I will ask you whether or not, at that time, you told any other person, and if so, whom, as to what your grandmother had said to you.

Mr. WORTHINGTON: I object to that, of course.

124 Mr. PERRY: I just want to know now the fact whether he did make a communication to any other person as to what his grandmother told him.

Mr. WORTHINGTON: I object to it even in that view.

Mr. PERRY: Of course your honor knows I do not pretend this is competent now. I don't propose to prove by him now that he did tell them or what he told them; I simply ask, at this time whether or not he told what his grandmother told him, to anybody else.

The COURT: What competency is there in that?

Mr. PERRY: It will be competent in this way. The authorities are somewhat divided upon the subject. They all go to the extent that if an attack is made upon a witness in any way, it is permitted to corroborate him on redirect by showing that at the very time or very near the time he made statements such as are impeached, to somebody else. I do not insist on this question now, but I want it understood that I am asking it now with special reference to what may develop hereafter, perhaps.

The COURT: I do not think it is competent now. I will exclude it.

Mr. PERRY: We note an exception.

Mr. PERRY: I offer to prove that he made the statement to two persons.

Mr. WORTHINGTON: I object.

The COURT: I will make the same ruling as above.

Mr. PERRY: We note an exception in each instance. We make the offer to prove the statements and, of course, the names of the two persons and all that we will put in the record, the time and exactly what it was he said.

Witness further testified that a few days after that he was in Washington; he does not know whether he remained or returned;

125 that he was at Hugh J. Fagan's, a liquor store on Eighth street below D, and a cab drove up and a party brought him

a note and said he was wanted at once at the city hall, at the register of wills' office. The note was signed by William R. Woodward. That he went right up to the city hall and Mr. Woodward, Dr. Taylor and Mr. Norment were standing up in the office, and his grandmother, Mrs. Norment and Mrs. Taylor were sitting there in front of the place. He was handed a paper, and they said that grandmother wished to administer on the estate and take out letters that day, and he was asked to sign it. He signed his name to it. He did not read it at all, simply signed his name. It had already been signed by the other parties. Said nothing at all. At the time he signed it, either Dr. Taylor or Mr. Norment touched him on the back and said: "That is worth $100,000 to you." Witness answered: "I'm much obliged," and further, "Is that all you wish of me?" They said, "That is all," and he walked out. The persons that he remembers as being present on this occasion were the ones above enumerated, and whether or not the judge was there he is unable to say, but hardly thinks he was. There was no one sitting there, however, in the front chairs except witness's grandmother and two aunts. That Mr. Woodward, the old gentleman, explained the paper to him, saying, "Your grandmother is anxious to take out letters today and just sign this paper, will you." It was then handed to him, and he walked right up to the desk against the wall and put his name on it, and it was then that the remark was made to him, "This is worth $100,000 to you." Witness was not positive whether it was Mr. Norment or Dr. Taylor who made the remark, but knows that it was said loud enough for his grandmother and Mrs. Norment and Mrs. Taylor to hear; then witness said: "Is there anything else you wish me to do?" and they said, "No," and
126 witness walked out, but before doing so spoke to his grandmother. The mortgage had not been paid off at that time. That a few days after he received the checks for the mortgage. One check was for 5,000 and some hundred dollars and one for $5,000 for which he gave his note to his grandmother, and then he was given 2,000 and some dollars in payment of a legacy that was left him under the will, that is, in payment of $750 note and interest on it. That was the way the *the* $11,000 was made up. Witness was not positive about the exact figures. That the $750 note which was mentioned in the will amounted, with interest, to twenty-one hundred and some dollars; and that when his grandmother's estate was settled up $5,000 of the $10,000 was charged against him, leaving witness 5,00[illegible] and some dollars given by his grandmother. That at the same time $5,000 was given to the others, each of his aunts receiving that sum. The $750 note is on file in equity 8140. That at the time his grandfather made his will, witness had not much money to speak of. His mother was his guardian and his income at that time was from Second National Bank stock, and to the best of witness' recollection he had about six hundred dollars a year. That at this time his mother used to give him money, but witness had no direct income until he went to work for himself; that he possibly had something less than the six hundred from his mother

as guardian. In 1887 he had the farm for which he paid $16,500, with the $11,500 mortgage, and some bank stock that amounted to about $5,000 from which he got about $300 a year, and had some income from a house on I street, real estate, four little frame houses, all of which income was a part of the $600 before referred to. Witness is sure that his grandfather knew what his financial condition was when his grandfather made his will, or shortly thereafter, and in answer to a question, whether or
127 not his grandfather knew what his financial condition was when he, his grandfather, made his will, or shortly thereafter, witness answered: "I am sure that he knew it." That witness still continued to live in Frederick after the death of his grandfather. That his grandmother died in March, 1893, and that during her life she lent him $20,000, and on one occasion she sent him a check. That this check came in a letter written by Mrs. Taylor stating that witness' grandmother had made a division of some few dollars among them or had given a present to them, and that witness had answered the letter, thanking his grandmother for the check, at the time. That he does not remember the amount of the check—it might have been $500, it might have been $5,000, he was not able to say at the present time. Did not receive any other moneys except the present at Christmas. That the check, to his recollection, was not charged against him in the settlement of his grandmother's estate. Witness has no personal knowledge of the advances to Mrs. Taylor except what he has seen. That witness received a lot of ground at the corner of Louisiana avenue and Sixth street under his grandfather's will, and that he sold the property in 1889 or 1890 for $20,000. That between the death of his grandfather and the death of his grandmother he did not do any act to attack his grandfather's will, and when asked why he did not replied, "I relied on the promise made me the day after the funeral."

Q. By whom? A. By Mrs. Taylor, in the presence of Mrs. Norment and my grandmother.

Q. You mean the promise you have testified to here? A. Yes, sir.

Q. When he died in 1889 or about that time, what knowledge, if any, did you have with respect to the law of estoppel?

(This question and also the other questions below as to the
128 witness' ignorance of law objected to by counsel for the caveatees, but after the argument on the objection had been partly heard the court decided to admit the evidence for the time being, reserving the question of its competency till a later stage of the case.)

A. None whatever.

Q. What knowledge did you have, if any, with respect to your rights in the matter then and there? A. None whatever.

Q. Did you have any knowledge with respect to what we lawyers call the doctrine of election, that is a rule of law or equity that would prevent you, if you take any benefit under the will, from disputing it in any way? A. I did not.

Q. Were you twenty-three years of age at the time? A. Yes, sir.

Witness further testified that at this time he resided in Frederick and had been residing there since 1883; that this was his home, except for about seven months in 1887; that he never studied law or read any law books until very lately; and that he relied absolutely on the promise that was then made to him by Mrs. Taylor in the name of his grandmother, in her presence and in the presence of Mrs. Norment, and that at this time, *i. e.* the day after his grandfather's will was read, he had no knowledge whatever with respect to the facts that he has set up in his caveat.

Q. What knowledge, if any, did you have with respect to the testamentary capacity of your grandfather at the time he made the will? A. None whatever.

129 Q. What knowledge, if any, did you have with respect to undue influence practiced upon your grandfather by Mrs. Taylor or by any other person? A. None whatever.

Q. What knowledge did you then and there have as to whether or not George W. Utermehle, at the time he made the alleged will, was of sound and disposing mind and capable of executing a valid deed or contract? A. None.

Q. What knowledge did you then and there have as to whether or not this alleged will of George W. Utermehle was procured by the undue influence of Rosa M. Taylor or of Leroy M. Taylor, Senior, or of either of them, or of any other person or persons? A. I had no knowledge.

Q. What knowledge did you then and there have of any fraud on the part of Rosa M. Taylor and Leroy M. Taylor, Senior, or either of them, or of any other person or persons, towards George W. Utermehle in the procuring of this will? A. None whatever.

Q. What knowledge did you have, then and there, of any duress or coercion on the part of Rosa M. Taylor or Leroy M. Taylor, Senior, or either of them, or of any other person or persons, towards George W. Utermehle in the procuring of this alleged will? A. I had none at all.

Q. State what knowledge you had at that time of the habits of intoxication of your grandfather, and of the extent to which they had progressed? A. I had no knowledge other than that to which I have already testified.

130 Q. To what extent did your knowledge then go of the association of George W. Utermehle with Mrs. Taylor and her husband in a business way? A. I had no knowledge other than that Mrs. Taylor acted as a clerk for him, and looked after his writing.

Q. And so far as her husband was concerned, how far did your knowledge then extend? A. I had none whatever, except as to the conversation that I had overheard between them as to loans. That was all.

Q. To how late a period did the ignorance and want of knowledge referred to in the preceding questions relating to this particular time extend? A. Until some months after I returned to Washington to live.

Q. In what year? A. 1900. I came back here in 1899, and it was in 1900 that I first learned of anything of the kind.

Witness further testified that his grandmother died March 13, 1893, and he was present at her death, and that from the time of his grandfather's death down to the time of his grandmother's death nothing was said to him of any change of intention on her part; and that after her death, the next morning down in the dining-room Mrs. Taylor spoke to him. He was not positive whether Mrs. Norment or any other person was present or not. Mrs. Taylor said: "Well, ma is dead; she was very liberal during her life and had she lived a few years longer, she would have died a poor woman." That she had very little left of what she got from his grandfather. That he did not say anything more than he was surprised to hear it; that not desiring to discuss the matter at that time, nothing further was said. After the funeral when they returned to the
131 house, the will was read in the presence of all the family, consisting of Dr. and Mrs. Taylor, Mr. and Mrs. Norment, Mr. Harry Norment, Miss Ellie Norment and Mr. Leroy M. Taylor, Jr. Witness was not positive whether Harry Norment was there or not. Witness heard the will read and then left; could not understand much about it; had a conversation with them a day or two afterwards, and the discussion came up as to what his grandmother was worth. Both Mrs. Norment and Mrs. Taylor were present at the conversation. They said that his grandmother was worth about $200,000, and then he remarked that it was a surprise to him; that he understood that she was worth almost if not quite equal to all of the real estate, and that he had always understood that the real estate would run up to a million or over—a million and two hundred thousand dollars. He could not see how the property, her personalty, should have depreciated so much in these two years. Mrs. Taylor said there was no use discussing it, that ma had given to charity and given to this and that. Witness remarked, "Well, I guess I will have to stand in then." That was all the remark made. A few days after that witness went to Frederick. What witness said was: "This will is a very great surprise to me and I presume it knocks me out entirely, something I did not anticipate."

Witness further testified, in answer to a question put by Mr. Worthington, that he anticipated an entirely different will; was completely knocked out; did not know what to say; it was so very different from what he had anticipated and from what he had every reason to believe it should be. That he went back to Frederick a few days after that, and not long after that was taken sick with rheumatism and never came back to Washington to attend to any business in regard to his grandmother's estate, or anything of
132 the kind. Witness executed a power of attorney to Charles W. Handy, who attended to all these matters and gave all receipts for whatever money was turned over in the transaction. Witness was then asked the following question by Mr. Perry:

Q Now, why did you not then put the matter in a lawyer's hands? A. Well, I kind of thought I couldn't get much out of

that will of my grandmother's, and I thought my grandfather's will was so far back that I had nothing to do; at least, I was entirely indifferent. I lost heart. My health was bad at the time and I had other troubles and things. My health was in pretty bad shape. I was sick in bed with rheumatism for possibly five or six weeks and I was really, for eighteen months after that, more or less subject to limping and walking around and having pain—rheumatism, and so on.

Witness further testified that he was sick for possibly eighteen months and did not entirely recover from the attacks of rheumatism until 1895. It was a combination of inflammatory and sciatic rheumatism, and that he had what is known as sciatic or muscular rheumatism for nearly a year after that. That in 1893 witness was drinking to some extent, more so than he had been previously and that he had financial trouble as well as trouble in private affairs. The trouble continued for about a year or more. That he was never able to actively attend to business after his grandmother's death until he took the City hotel in 1895. That witness got about $60,000 and a third interest in the square on Capitol Hill from his grandmother's estate, and that his interest was sold under a deed of trust, the trust being for $13,500.

Witness was then asked the following question:

133 Q. Now, Mr. Utermehle, when was it that you first learned any facts with respect to your grandfather and his will, that you did not know before, and what was the occasion of it? A. The occasion started with my mother's telling me one evening that she had been down to talk with Mr. Terry.

Witness further testified that he went down to see Mr. Seth A. Terry, and then his mother went to see Mr. Lambert and Mr. Lambert came up to the house at about four or five o'clock one evening by appointment. That witness and Mr. Lambert then went to look over papers in the grandmother's estate in the orphans' court, and then they looked at the papers in the case of Norment *vs.* Norment, which had never been read or noticed by witness before, and also the case in which was involved the $750 note. That he read the papers in the case of the $750 note and then glanced over the case of Norment *vs.* Norment, and had a further conversation with Mr. Lambert, and after looking at the facts testified to in the several cases, took Mr. Lambert's advice entirely and mailed a letter tendering back his property. That two letters were mailed, one to Mrs. Taylor and one to Mrs. Norment, and both of them were offered in evidence, they being duplicates. The letter to Mrs. Norment read as follows:

(C. H. UTERMEHLE No. 2.)

WASHINGTON, D. C., *May 19th*, 1900.

Mrs. Mamie E. Norment, # 928 M street N. W., city.

DEAR MADAM: In view of the fact that I was under a misapprehension and ignorant regarding my rights at the time my grand-

father, George W. Utermehle, died, and that misrepresentations were made to me by those interested touching both my rights and interest in his estate, I hereby notify you that I deny the validity of the paper-writing alleged to be the last will and testament
134 of said George W. Utermehle, which has been admitted to probate in the orphans' court for personal property, I contend that said alleged will has never been operative in connection with real property, in which event the real interest vested in me to the building and ground known as Young's law building being the premises designated as lot No. 29, square No. 490, in this city, was merely a one-third interest in said property as tenant in common with the other heirs-at-law of said deceased. I hereby tender myself ready to account upon demand to both you and Mrs. Taylor for the one-third interest to which each of you in such case are entitled as two of the heirs-at-law of George W. Utermehle, in both said property and the rents and profits from same from the time of the latter's death.

I also tender myself ready upon demand to make proper settlement to both you and Mrs. Taylor for the $750 note, with accrued interest thereon, which had been already paid and was pretended to be bequeathed to me by said alleged will.

Kindly favor me with an answer touching the matter contained in this communication as soon as possible.

Very respectfully yours,

(Signed) C. H. UTERMEHLE.

Witness further testified that he did not receive any answer to either letter, and that no answer has been received to either of them up to this day, and that he received no communication from Mrs. Taylor or Mrs. Norment; that he continued his search for information and facts, and interviewed a large number of persons from whom he learned quite a few facts in regard to his grandfather's capacity, and in regard to his actions, and a good deal about his drinking habits, and also he learned a good deal about his business relations with Dr. Taylor and his wife. That every bit of information received was laid before Mr. Lambert and he was instructed to file the caveat that was filed in this case; and then the action of ejectment was brought against Mrs. Taylor to recover the portion that went to her.

Witness further testified that at the time he made the tender in the letter set out in the record, there was not any executor of his grandfather's estate, there being none appointed after the
135 death of witness's grandmother who was executrix mentioned in the will of George W. Utermehle. Thereupon he was asked the following question:

Q. At the time you wrote this letter making this offer of tender, state whether or not you were in a position to carry out its terms, had they been accepted? A. Yes, sir, I was.

Witness further testified that at the death of his grandfather he knew quite a good deal of his property, but did not know it all;

that so far as he knew, it was improved; he had a long row of houses and stores on the east side of Seventh street running from Massachusetts avenue south; could not say exactly how many houses there were but possibly twelve or fourteen; the same were business places and residences; they were three stories and stores; don't know the exact rental value of that property. Between I and K, on the west side of Seventh street, he had eight stores and houses, to the best of witness's knowledge. A piece of property at Eleventh and L streets, improved by a large house on the corner and two smaller houses on the back of the lot, and the property at H and New York avenue; a whole square of ground bounded by S and T, 8th and 9th streets, with either fifty-eight or sixty dwelling houses corner of 6th and Louisiana avenue; also the corner of Sixth and C streets, and a square of ground on Capitol Hill, and the N. W. corner of 7 & M Strs., property occupied by Geo. W. Driver on north side Penn. Ave. and twenty-seven acres in country.

Witness further testified that he never heard of any other will made by his grandfather except one mentioned by Mr. Perry in his opening statement, as having been made in 1859; that his grandfather, up to three or four years preceding his death, or possibly a little longer than that, in conversation with witness talked very little; he would sit and read the paper, sometimes get excited and get to talking in the German language; he would never hold any protracted conversation with witness.

136 Thereupon witness was asked the following questions:

Q. Your grandfather's alleged will, you recollect, was made in December, 1887. Do you know whether or not at that time your grandfather was transacting any business, or rather, at that time, was he to your knowledge transacting any business? A. To my knowledge he was not.

Q. How long before that was it that he had transacted any business, to your knowledge—how long before December, 1887? A. I saw him, as I have said, in the spring or early summer of 1887. He did not seem then to be attending to any business.

Q. From the time this paper was signed, in December, 1887, to the time of his death, in April 1889, was he, to your knowledge, transacting any business? A. No, sir.

Q. When your grandfather's will was read, just after the funeral, as you testified, did you notice the date of the will? A. No, sir.

Q. When was your attention first called to the date of the will? A. After I commenced investigating this case in 1900 with Mr. Lambert.

Q. Was there anything in the will itself, as it was read, that called your attention to its date? A. Nothing that called my attention to its date, except that I was led to believe from the reading of the will that the will had been made quite a few years before his death.

137 Q. Why or how? A. The fact of the $750 note being contained in there, and my own personal knowledge that it had been paid in 1884.

Q. Did you ever receive that $750 note? A. No, sir.

Witness further testified that on the day of his grandfather's death, he got to the house at ten or eleven o'clock in the morning, and that they were all in his bed-room for several hours, that is, Mrs. Norment, Mrs. Taylor, and his grandmother and Dr. Taylor. That his grandfather was dying along apparently for quite a while, and he was thought to be dead on one or two occasions, but he would revive and breathe a little more; that Mrs. Taylor and the Doctor examined his extremities, his hands and feet, and Mrs. Taylor finally said he was getting colder and colder; Mrs. Taylor seemed to be nursing him more than any one else; at last Doctor Taylor, who had his watch in his hand, closed it up and said, "He is dead;" that is every word that witness heard in the room at the time; that the only person, if anybody, that witness heard sob in the room was his grandmother.

Thereupon Mr. Perry offered in evidence a paper served on witness in the proceedings taken to probate the will of George W. Utermehle. The paper read as follows.

"THE UNITED STATES OF AMERICA:

The President of the United States to Charles H. Utermehle, 1132 12th St. N. W.:

You are hereby commanded to appear before a special term for orphans' court business, of the supreme court of the District of Columbia, to be held at the city of Washington, in and for said District, on Tuesday, the 31st day of July, A. D. 1900, at one o'clock p. m., to show cause, if any you have, why the paper-writing, dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, should not be admitted to probate and record as a will of real estate.

Witness A. B. Hagner, justice holding the special term of said supreme court for orphans' court business, this 19th day of July, A. D. 1900.

Attest: LOUIS A. DENT,
Register of Wills for the District of Columbia."

138 On cross-examination the witness testified that he had not read over all the report of his testimony, but had read over the proceedings of the afternoon of the day before; that he went to school to the Emerson Institute, to Young's and left there and went to Mr. Flynn; that he went to Mr. Flynn about 1879 or 1880, and remained there until 1881, or possibly the spring of 1882; that he was about seventeen years old, or a little younger when he left going to Mr. Flynn; that he generally left Washington in June coming back in October, but as a rule from the time he came back in October until he went away in June, possibly except during the Christmas holidays, he would go over to his grandfather's and stay from Saturday or Friday night sometimes until Sunday evening; that that would be six or ten or maybe twelve or fifteen times a year,

perhaps more that he visited his grandfather; and this was from the time he was ten or eleven years old until he was about sixteen or seventeen, when he went to Frederick, in the early part of the summer of 1882; that on these visits he would see his grandfather whenever he was home and it was his grandfather's rule to be at home at meals, in the evening, and every Sunday; that during these periods he sometimes went our driving with his grandfather, but this never occurred after the witness went to Frederick, and that during these drives he noticed that his grandfather drove pretty fast. It was during this period that he observed his grandfather's tendency to drive fast; that he never drove with his grandfather after he, witness, went to Frederick.

Upon being asked what were the peculiarities to which he referred on his direct examination witness replied that his grandfather seemed always to be peculiar in this, that when he would
139 talk to any one he would not ask you for your opinion—he would tell you right straight his opinion, or he would speak about something in that way, and in that he drove around and walked around the place—that witness spoke of his peculiarities in that line.

That he would not say that his grandfather was strongly of his own opinion—he simply expressed an opinion of something that he got his idea on; witness would not say that it was his direct opinion.

As to his peculiarity in walking around his place, the witness stated he had seen his grandfather go out there around his place in the spring of the year and trim rose bushes and he would cut in among the thorns there and have his hands all bleeding from cutting in among the thorns. Witness naturally supposed that this was a peculiar action—that the average person would put on gloves to cut rose bushes—at least witness was brought up to do it; that he had seen his grandfather cut rose bushes in the spring and getting his hands cut from not wearing gloves, witness would suppose, on three or four occasions.

Being asked whether his grandfather had any other peculiarity during this period, witness replied that he noticed him on several occasions there at noon, if his colored man was a little late coming to dinner, he would get mad and jump into him; that on two or three occasions he threatened to discharge him and, in fact, he did discharge him that the colored man did not pay any attention to him; that witness could not understand that; that his grandfather swore at the colored man in a combination of German and American; witness could not understand German, but he had heard people speak German and took it for granted it was German; that it was a different language from what witness spoke; that the reason the witness knew it was swearing, although he did not know what language it was, was that he would use the name of God in
140 the German language, and in that way witness concluded it was swearing and heard him swear in English often.

Q. That was his peculiarity No. 4. He would scold his man and

swear at him when he came late, and discharge him, and the man would go on about his work. Anything else? A. I think that is about all on that line.

Witness on further cross-examination testified that he really was in Frederick from that time on; that before he went to Frederick his grandfather would be around his place and witness would be going around with him as a boy; that in going to the oyster wharf with his grandfather they walked to the foot of 11th street, a distance of nine or ten squares. This was generally on Saturday evenings. That he walked to the oyster wharf with his grandfather, witness supposed, two or three times all told, and sometimes they drove down; that his grandfather would generally carry the oysters back.

Witness went around with his grandfather only once when the latter was collecting rents and then witness did not really go with him collecting his rents; that this occurred before witness went to Frederick; and that on that occasion his grandfather stopped at a couple of stores on 7th street between I and K, and witness presumed he went to collect his rents as he got out and went into one store and then went into the next one; that witness said he was collecting rents on this occasion; that witness took it for granted that that was what he was doing. On one occasion before he went to Frederick to live, the witness went to Dr. Taylor's house to meet his grandfather, but did not go in the house; stood on the steps; his grandfather was coming out; his buggy was standing in front of the place; that his grandfather up to the time that he went to Frederick was in the habit of making him a
141 Christmas present; that when he first started he gave him twenty dollars on Christmas; then he raised it up, and finally he got up to a hundred dollars; if witness was not there at Christmas he did not receive a present. His grandfather had said to him on one occasion, "If you do not come here Christmas you do not get any present." The witness went there whenever he was in Washington, and was at his grandfather's, as far as he can remember, every Christmas until he went to Frederick. That he did not notice any indication that his grandfather was of unsound mind up to 1882, because he had no opportunity to observe anything; that he merely saw him around and observed nothing to indicate that he was of unsound mind at that time; that he has no opinion from his personal observation, as to whether or not his grandfather at that time was of unsound mind, that is to say, before he went to Frederick. That witness was in Washington part of the winter of 1882 and 1883 but went to Frederick on the 13th of May, 1883, to live; could not tell the exact portion of the winter he spent in Washington; might have been there three or four days in the week, or one week all told, and was in Frederick the rest of the time; when here he saw his grandfather, and during 1882 saw him some three or four times, and was possibly there Christmas; that when witness went to his grandfather's to stay all night, as a rule he occupied the room adjoining the one his grandfather and grandmother occupied; they

occupied the room over the parlor. The room was a corner
room but looked west and then over the Eastern branch, the rail-
road track, and there were one or two windows in the room that
looked on 2nd street; that witness moved on a farm near Frede-
rick in 1884; was living in the town of Frederick from 1883 until
he went on the farm, which was about two miles from Frede-
rick; that there are one hundred and fifty acres in the farm.
Witness was married on February 5th, 1884, and three
142 or four days after his marriage came to Washington, and while
here on that occasion stayed for three or four days and went
to see his grandfather with his wife; he made a call presumably of
about an hour, and they were received in the parlor and nobody
home but the grandfather and grandmother. Witness stated that
his wife, whom he married in February, 1884, is still living, but that
she ceased to be his wife on the 27th day of December, 1893, and is
still living in Washington; that witness has three children; that in
February, 1887, witness came to Washington with his wife and
stopped at the house of witness' mother; that witness came to Wash-
ington in February, 1887, and went into the real-estate business with
S. D. Newcomb, formerly of the firm of Newcomb and Logan; that
witness remained there until the middle or latter part of June, the
office of the firm being opposite the Arlington hotel, 15½ and H
streets; that during this period he was here living with his wife,
and engaged in the real-estate business; that he was back and forth
to Frederick now and then, but that his principal business was here;
that he and his wife did not go to see his grandfather during this
time because whenever he could get away from the place he went to
Frederick; that during the months when witness was engaged in
the real-estate business in Washington he went over to see his
grandfather about a half dozen times; that he did not take meals
there—he might have taken a meal there, but he was not positive of
it; that on these visits he would stay a couple of hours; would go over
about twelve or one or two o'clock; that the dinner hour at his grand-
father's house was about twelve o'clock; and that it is likely witness
went over there on two or three occasions with his wife on Sundays
during that time and did take dinner, and would stay around a
143 while after the dinner with the family, and would see his grand-
father there; that witness could not say that this occurred on
over three or four occasions from February to June, 1887; that dur-
ing this period witness, as he had already said, went to see his
grandfather about the plate-glass insurance; that on the first of
these two visits witness was alone and went over to see his grand-
father about the plate-glass insurance business; that he then saw his
grandfather about the plate-glaadd insurance in his dining-room
about twelve o'clock; that he took dinner there and doesn't think
he stayed over an hour; that his conversation with his grandfather
in regard to the plate-glass insurance was very short; that he simply
asked his grandfather to give him the insurance and his grandfather
said he would see about it; that he specified in what house the
plate glass was that he wanted to have insured; that the second

time he went to see about the plate-glass insurance he saw his grandmother, not his grandfather; that while the witness was in the real-estate business in Washington he does not think he saw his grandfather anywhere away from his house.

Q. Now, on the occasions when you did see him in the year 1887, was he drunk or sober? A. Well, I would see him taking a drink.

Q. That is not the question I asked you. I asked you whether he was drunk or sober? A. I could not say as to that.

Q. You mean that when you see a man on half a dozen occasions and talk to him and take dinner with him, you do not know whether he is drunk or sober? Do you mean to say that? A. I do not think I noticed he was drunk at that time. I could not say he was absolutely sober at that time.

144 Witness further stated that on one or two occasions when he went over to his grandfather's house during that year he took a drink with his grandfather in a room which was directly underneath the bed-room that the witness slept in when he was there, and which room did not open out of the dining-room.

Witness further testified that he did not see his grandfather after witness went out of the real-estate business in the summer of 1887 until he took dinner there on Christmas of 1887; that during that time witness was in Washington for one day just between trains; that when he took dinner at his grandfather's house on Christmas day of 1887, he went over there about eleven or twelve o'clock with his wife; that he stayed there until four or five o'clock in the evening—until after supper—about six o'clock, taking both dinner there and tea; that his grandfather was in the house there at dinner time, and that his grandfather carved the Christmas turkey himself; that he carved for eleven people—Dr. and Mrs. Taylor, young Mr. Taylor, Mr. and Mrs. Norment, and their two children, Mrs. Utermehle, the witness and his wife, and the grandfather himself; that the meal did not last an hour, and that his grandfather was at the table during the whole period.

Q. Was he at the table during the whole period? A. Yes, sir.

Q. Was he drunk or sober? A. He seemed to be drinking that day.

Q. He seemed to have been drinking? A. Yes, sir.

Q. Was he drunk? A. Well, I would not say he was so drunk he could not navigate, or anything that way.

Q. He was not so drunk he could not carve the turkey? A. Well, he made a fair—he did not carve it as well as I would think a person should carve a turkey.

145 Witness further testified that when the turkey would not cut to suit his grandfather, he got very angry; that on this particular day his grandfather gave you what he himself thought you ought to have, and you took it, and said nothing—that was a general understanding; that witness could not say that his grandfather carved the turkey on that day as well as he had been in the habit of doing—that he would not say he did.

Q. You noticed that there was some change in him? A. Well, yes; he seemed to be more, as I have said, more feeble.

Q. Yes. But did you not notice that his habit of intoxication had grown on him? A. I took two drinks with him that day.

Q. You are not answering my question. A. Yes; I noticed he was drinking more that day than at any other time.

Q. More than at any other time you had ever seen him? A. Yes.

Witness further testified that on that occasion his grandfather was not at tea that evening; that he was then apparently upstairs; that witness heard him come down and the woman went and got him at the end of the steps and persuaded him to go back upstairs; that witness thinks that all the other persons who were present at that Christmas dinner stayed to tea in the evening, so that when this event occurred there were nine other persons present besides the witness and his grandfather.

Witness further testified that he does not think he saw his grandfather until from Christmas of 1887 until Christmas of 1888; that it was likely that two or three weeks or so prior to Christ-
146 mas that witness might have gone over there; that he might have been over there two or three weeks before Christmas of 1887, but it was not likely that he was there any more at all during that period; that the witness never was in Washington to remain any length of time, even a week you might say, from that on until his grandfather died; that witness was in Washington on a number of occasions two or three days at a time between Christmas of 1887 and Christmas of 1888, but hardly thinks he went to see his grandfather; that he might have gone over for an hour or such a matter, but has no definite recollection—that if he was there on Sunday he likely went over.

Witness on further cross-examination testified that on Christmas of 1887 his grandfather made him a present; that this was before dinner; and that it was either $50.00 that day and $100.00 the following Christmas, or *vice versa*.

Q. Did you have any hesitation in taking the money when he gave it to you? A. No sir; they all took it. He just handed it around.

Witness further stated that he was not positive whether on that Christmas day his grandfather handed the money to them or whether Mrs. Taylor did and said, "This is from pap."

That if it was not on that Christmas Mrs. Taylor handed the money, it was on the following Christmas.

Q. Did you have any hesitation in taking the hundred dollars whether it was from him or through Mrs. Taylor? A. Not at all.

Q. You did not suppose he did not know perfectly well what he was doing, or that he was not able to give away his money, did you? A. He was giving it to all of them.

147 Q. I am asking you whether you understood you were taking money from a man who did not know what he was doing and did not know how to distribute his property? A. I had no idea of the kind.

Witness further stated that he thinks all the persons were present at the Christmas dinner of 1888 who were present at the Christmas

dinner of 1887; that they had turkey on Christmas of 1888, but witness was not able to say who carved the turkey that day; that he and his wife went there on that day about the same time they did on Christmas day of 1887, and possibly they stayed for tea, but he was not sure; that it is very possible that he and his wife were there the same length of time that Christmas that they were on Christmas of 1887—that this is witness' best recollection; that his grandfather was not at the table at tea that evening; and that nothing happened that day that witness remembers was out of the ordinary. Witness further stated that he does not remember his grandfather being at dinner that day; that if he was he took no part in the dinner at all; witness thinks his grandfather was in such feeble health that he would possibly be lying on the lounge; that he remembers seeing his grandfather on that day, but has no recollection at all about him that day; that witness got his present that day; that it was a hundred dollars, and that he is positive Mrs. Taylor gave it to him; that he could not say whether his grandfather was drunk or sober that day, as witness did not drink with him that day; that he seemed to be in a feeble condition and did not seem to take an active interest in anything that day, but that he did not give any indications one way or the other of being drunk; that witness was not in Washington from that time on until his grandfather's death; but backwards and forwards all the time; that he could not say he saw his grandfather often from Christmas of 1888 until his grandfather's death in the following April; that
148 he saw him on two or three occasions and knew he was in feeble health; and that witness kept in touch with Washington at all times.

Q. Were you not in Washington as much as you were in Frederick, between Christmas of 1888 and the day he died? A. My time at that time—all of this time when I was backwards and forwards between Frederick and Washington—was all split up. I would go down the street and would make up my mind to go to Frederick, or I would make up my mind in Frederick to come to Washington. I have no idea of dates or anything of that kind. It was just as business called me at the time that I went backwards and forwards to these places.

Q. All of which does not answer my question. My question was whether you were in Washington from Christmas of 1888 until your grandfather died as much as you were away from Washington? A. I might have been.

Q. Have you any recollection as to whether you were or not? A. I have no positive recollection. Witness further stated that his wife and children at that time were staying in Washington with his mother; that when he came here he went to his mother's house; that his best recollection is that from Christmas of 1888 until his grandfather's death he did not see his grandfather but two or three times, if that often; and that when he did see him it was at his grandfather's house; that when the witness went over there his grandfather would be upstairs or lying on the lounge, or something

that way, and witness would talk with his grandmother and chat a few minutes with his grandfather—would speak to him and possibly go; that his grandfather did not hold any conversation with
149 him at all at that time; that he seemed to have stopped talking to any one about that time; that he was feeble.

Q. Do you mean you had no conversation with him at all? A. I would speak to him and ask him how he was and how he was feeling or something that way, but as far as conversation went we never had any extended conversation together.

Q. Never in your life? A. Never in our lives, only on two occasions.

Q. On these few occasions when you saw a little of your grandfather during these last three or four months of his life, was he drunk or sober, if you can tell? A. I couldn't tell you as to that. I didn't drink with him at that time. I didn't notice him.

Q. You did not drink with him and did not notice whether he was drunk or not? A. No, sir.

Witness further testified that on the day of his grandfather's funeral after he came back from the funeral the will was read, and that the persons present at the reading were witness' grandmother, Dr. and Mrs. Taylor, Mr. and Mrs. Norment, and witness and his wife, and Mr. William R. Woodward; that after the will was read witness got up and walked out, and that his wife went with him; that it is not a fact that they both stopped and took tea with Dr. and Mrs. Taylor and Mrs. Norment; that on that occasion Mrs. Taylor asked witness to come over the next day; that he returned the next morning, his wife not being with him; that it was in the conversation that then took place that the promise was made to him; that nothing was said during that conversation as to the amount of Mr. George W. Utermehle's real estate; that witness' best recollection is that nothing at all was said about that subject on that occasion; that there was something said by Mrs. Taylor
150 as to the comparative value of his grandfather's real and personal estate; that witness was there on that occasion from about three-quarters of an hour to an hour, possibly not that long; that witness had said on his direct examination that he was there from three-quarters of an hour to an hour; that during that time Mrs. Norment did not speak a word, except she spoke to the witness as he came in, as she always did. Being asked whether during that time Mrs. Utermehle said anything except what remarks she made about the mortgage, the witness replied that she said she wanted to pay the mortgage off right away; that witness had said on his direct examination that he only spoke on one occasion during that conversation and that is materially correct.

Q. Were you sitting around there looking at each other, not saying anything, part of the time? A. Mrs. Taylor was doing all the talking.

Q. Now, one moment. During the time you were there, were you four sitting around doing nothing, or was there something being said all the time? A. Literally speaking, I might say there was a

few words of conversation on different things, but I was alluding to the subject that I was speaking about at the time when I talked.

Witness further testified that the greater part of the time the subject he spoke of was under discussion; that he spoke more than once because he explained to them the amount of the mortgage on his farm, and there were some inquiries about his farm, and things of that kind, and possibly he made a few more remarks, and possibly spoke more than once.

Q. To come back again to your grandfather's last days, do you remember that on your examination by Mr. Perry you said you saw your grandfather several times a day in his last illness?

151 A. Several times a day.

Q. I read from page 217: "Q. How long before the day of his death had you seen him? A. I was over there, I think, several times each day, or most every day, or possibly within two or three times of his death." A. I don't think I said several times. I might have said several times, or possibly each day prior to his death; and my recollection is that I was over there for three or four days or so, or maybe a week, each day prior to his death.

Q. You did not say then you were there several times a day during that period? A. No, sir.

Witness further stated that the occasion when he was with his grandfather when he bought a horse was long before 1887, and his best recollection is that it was before he went to Frederick in 1882; that the horse was put up at auction at a place on the south side of Pennsylvania avenue, between Ninth and Tenth street; that he and his grandfather drove along there that day; that he happened to be with his grandfather.

Being further interrogated about the conversation at his grandfather's house on the day after his grandfather's funeral, and being asked whether he had not stated on his direct examination that his grandmother simply smiled and acquiesced and that there was not a word spoken by any one else except Mrs. Taylor and himself, and that the only remark he made was what the mortgage on his farm was, witness replied, "I was speaking then in a literal sense as to the conversation on that point alone;" that Mrs. Norment might have spoken when he first went in there; that Mrs. Utermehle on that occasion did not say anything only when the question was asked about the mortgage, "and I made the remark it was $11,500.00," and she said, "I want to pay that right off for you."

Q. Did anything like this occur on that occasion, Mr.

152 Utermehle: Mrs. Taylor began and said "Charlie, we know that under the will you have been left very little, almost nothing, but ma has been left $600,000, all the personal property, which is about as much as Mamie and I get under the will, and papa has told her she is to look after you, and when she dies her will will be entirely in your favor, and that will make things even"? A. No, sir.

Q. Nothing of that kind took place? A. Not anything of that latter part took place or anything about the $600,000. There was a portion of it took place but not any words in regard to $600,000.

Being then asked whether witness was present when Mr. Perry, of his counsel, made his opening statement to the jury, from which cross-examining counsel has been reading, witness replied that he was present and that the information that Mr. Perry had was virtually almost in substance correct; that the only thing is that witness' understanding of the statement that was made to him at that time was that his grandmother had been left all the personal estate which was almost if not quite equal to the realty; that this was the statement that witness understood and that he conveyed to his attorneys at all times. Witness further testified that he understood at that time that the real estate amounted to over a million dollars, and understood always that his grandfather was worth two millions and over.

Q. So that is the way this comes about. You understood his real estate to be over a million, and when she told you that her mother would take personal property about equal to the real estate, you figured out the amount yourself? A. Certainly.

Q. And it was not her statement? A. I figured out the natural result of the statement as made to me.

153 At this point witness was shown three checks purporting to bear his endorsement, which endorsement he admitted to be genuine, and the checks were offered in evidence for the caveatees, and are as follows:

WASHINGTON CITY, *May* 9, 1889.

Bank of Washington

Pay to Charles H. Utermehle or order two thousand one hundred sixteen .88 dollars in full for note and interest left in will to C. H. Utermehle.

$2116.88. SARAH UTERMEHLE, *Executrix.*

Endorsed: C. H. Utermehle.

WASHINGTON CITY, *May* 9, 1889.

Bank of Washington

Pay to Charles H. Utermehle or order five thousand dollars.

$5,000.00. SARAH UTERMEHLE, *Executrix.*

Endorsed: C. H. Utermehle.

No. 2. WASHINGTON, D. C., *May* 9, 1889.

Central National Bank of Washington City

Pay to the order of Charles H. Utermehle, six thousand five hundred & sixty-six 66/100 dollars.

$6566.66. SARAH UTERMEHLE, *Executrix.*

Endorsed: C. H. Utermehle.

154 Witness was thereupon shown by counsel for the caveatees a power of attorney purporting to bear his signature, which signature he admitted to be genuine. He testified that Mr. Handy came to Frederick when witness was lying hardly able to get his head off the pillow and got him to sign the paper; that he was at death's door the day he signed the paper; that he had no trouble with Mr. Handy; that Mr. Handy and he are the best of friends; that he asked for the paper a long while ago and that Mr. Handy searched for it; that witness asked for it about two years ago and they could not find it anywhere. Thereupon counsel for the caveatees offered said power of attorney in evidence, and it is as follows:

Power of Attorney.

Know all men by these presents, that I, Charles H. Utermehle, of the city of Frederick in the State of Maryland, do by these presents make, constitute and appoint Chas. W. Handy of the city of Washington in the District of Columbia, my sufficient and lawful attorney, for me and in my name to draw and indorse checks, make and indorse promissory notes, to draw, accept and indorse bills of exchange; to accept and receive payment of any and all notes or bills due or to become due me, and to make and give all necessary discharges and acquittances therefore; to invest money on the security of real estate; to lease lands and tenements, to recover possession thereof, ask, demand, receive and sue for all moneys or accounts due to me and to receipt for the same, also giving and granting to my said attorney full power and authority, for me and in my name, to employ and consult with counsel learned in the law, in all matters and things relating to my real and personal property and estates, and to commence and prosecute any actions in any courts having juris-
155 diction, when in his judgment and discretion it may be necessary or advisable so to do, in relation to any of the matters hereinbefore mentioned.

Giving and granting to my said attorney my full power and authority in the premises to do and execute all things in as ample a manner as I might do, if personally present. Hereby ratifying and confirming whatsoever my said attorney may lawfully do, by virtue hereof, in the premises.

In testimony whereof, I have hereunto set my hand and seal this fifth day of May, A. D., 1893.

C. H. UTERMEHLE. [SEAL.]

Signed, sealed and delivered in the presence of—
C. H. DOLL.

Witness testified that the witness to this instrument, C. H. Doll, is a resident of Frederick, and is still living; that when Mr. Handy came to Frederick to have witness execute this power of attorney, Handy said to him that he wanted him to execute a power of attorney to him, Handy, to receive some money and obligations that

were coming to witness from his grandmother's estate; that having the utmost confidence in Mr. Handy, as he has today, and all, he was very sick, was at the point of death for a long while there, he signed this paper; that Mr. Handy was there between one train and another and was not in witness' room over twenty or thirty minutes. Being asked whether Mr. Handy had acted for him before in the matter of this estate, or in any business matter before this, the witness replied, "Oh, yes; but he had never acted in any business relations that required him to come up there before that time; that Handy asked witness to sign this power of attorney without any suggestion from witness and on his own mition; that witness had never attempted to revoke the paper but had asked for it about two years and over before he tes-
156 tified and understood the paper was virtually out of existence and revoked a long time before, as far as the purposes of the paper were concerned, after witness got on his feet and got back here to Washington and got to attending to his own business; that he never executed any paper revoking the power of attorney, and that he never had any occasion to look for it prior to the time about two years before he testified when he wanted it and looked for it in a business matter; that Mr. Handy had never directly accounted to the witness for any moneys he collected from the estate of Sarah Utermehle; that Handy went on transacting witness' business and attending to it, and possibly they never had a direct settlement in their lives; that witness did not know whether or not Handy under that power of attorney employed counsel to represent witness in the matter of the estate of Sarah Utermehle; that witness had no recollection of Handy doing that, and that witness never authorized him to do anything of that kind; that witness had heard counsel read from the power of attorney; that witness did by the power of attorney authorize Handy to employ counsel; that witness thinks that came into possibly other matters that occurred later on. Thereupon counsel read to the witness the clause in the power of attorney relating to the employment of counsel and witness stated that that was the first time he ever heard those words in that paper; that Handy had not at any time advised witness that he, Handy, had employed counsel in any matters connected with the estate of witness' grandfather or grandmother; that at the time the power of attorney bears date witness was in Frederick at the City hotel, where witness went ten or fifteen days, but couldn't say definitely, after his grandmother's death: that witness was not here every day of that ten or fifteen days, but was backwards and forwards to Frederick and finally went to Frederick with the intention of coming
157 back to Washington the next morning, when he was taken sick; that during the time he was in Washington, backwards and forwards, before he was taken sick, he did not see Mrs. Taylor or Mrs. Norment, or anybody representing them, about the estate of Sarah Utermehle.

Q. Did you make any request of anybody, or demand that Mrs. Norment and Mrs. Taylor, as the executrices, as we may say under

the will of Sarah Utermehle, should serve without any commission? A. I did sir.

Q. You did that? A. Yes, sir.

Q. That was before you were taken sick? A. Yes, sir.

Q. Tell us what happened about that. A. Well, that was arranged, I understood. That was arranged all right that they agreed to serve without commissions.

Q. With whom did they agree? How did it come about? A. I don't remember how that came about at all. I know they agreed with Mr. Carusi, I think, and Mr. Handy.

Q. I understood you to say that this was before you became sick. Mr. Handy did not have anything to do with it until this power of attorney, did he? A. Mr. Handy has attended to what little business I have had since 1890. I came in direct close contact with Mr. Handy from 1889 on.

Q. Had you consulted Mr. Handy after the death of your grandmother and before you were taken sick at Frederick, about the business of the estate of Sarah Utermehle? A. I simply talked to him and we talked together about these notes, or rather, this per-
158 sonal estate being divided equally among us three; and Mr. Carusi has always been a friend of mine and a friend of ours, and I think Mr. Carusi and I, in discussing the thing in that line, said we thought they should serve without commission, as they were the two executrices, and I was not one. I had a perfect right to be and executor, and I think in view of that Mr. Carusi arranged that matter for me; but that was, you might say, a friendly act.

Witness further testified on cross-examination, that this was before he was taken sick, and before he gave the power of attorney, as he recollects, but that he is not positive of it; that the witness has been referring to Mr. Eugene Carusi, who has always been a friend of his, and that witness means that in what Mr. Carusi was doing in regard to this matter of commission, he was acting for the witness in a friendly way; that witness knew that; being asked whether the witness authorized Mr. Carusi to act for him in a friendly way, witness replied: "I talked with him and Mr. Handy. We talked together, and it was suggested that it was an unfair proposition that they should be the executrices of that estate and charge a commission, as I had as much right to be an executor with them; and the proposition was not that they were to serve as executrices without commission, but that I was to be made a co-executor with them, to be put on an equal footing with them. That was our proposition."

Witness further stated that he didn't think he authorized Mr. Carusi to see them about it; that he thinks they came to Mr. Handy, knowing that Mr. Handy attended to his affairs, and witness is confident that Mr. Handy and Mr. T. P. Woodward had a great many conversations about this matter, and know a great deal about it; that witness after his grandmother's death, and
159 before he was taken sick at Frederick, talked to Mr. Handy and Mr. Carusi about this matter of the commissions on one occasion, and that the suggestion that was made at that time was

that witness should be made an executor; that as a matter of fact he never was made an executor; and never knew absolutely that the executrices had agreed to waive their commissions—that he did not know it to his own personal, absolute knowledge—he may have known it—that he thinks he was so informed by Mr. Handy or Mr. Carusi, but is not absolutely certain of that.

That witness did not have any conversation with Mr. Handy or Mr. Carusi or both of them together with reference to having the real-estate notes that his grandmother held at the time of her death sold, so that the estate could be distributed without waiting for them to be collected; that he thinks he knows Mr. Carusi's handwriting.

Thereupon counsel for the caveatees exhibited to the witness a letter, and asked him whether it appeared to be in Mr. Carusi's handwriting; and he replied that he thought it was Mr. Carusi's handwriting.

Thereupon counsel for the caveatees offered said letter in evidence, counsel for the caveator stating that they did not object to it. Said letter is as follows:

"The District Title Insurance Co.

Capital, $200,000.

610 Thirteenth St. northwest.

WASHINGTON, D. C., *June 6th*, 1893.

Wm. R. Woodward, Esq.

DEAR SIR: I am authorized by my client Mr. Chas. H. Utermehle to give notice to you as counsel of the executors of the late Mrs. Sarah Utermehle that he insists that all the overdue notes held by him be forthwith converted into money by enforcing the deeds of trust
160 by which they are secured; and that he will insist that they make good out of their separate estates any loss that may occur by accumulation of taxes, interest, depreciation of the security or otherwise howsoever, by reason of their failure or neglect to enforce said deeds of trust.

Very respectfully yours, EUGENE CARUSI."

That after his grandmother's death and before he had the attack of rheumatism, and before the power of attorney to Handy was given, Mrs. Taylor and Mrs. Norment spoke to witness about some things that did not appear in her will—some household effects which she wanted to give to this one or that one, and that when they told him about that he said that was all right; that he thinks one of these things was a gift of $500 to Louisa Smith, but is not positive about it; that he has no recollection that Mr. Handy under the power of attorney to him from witness, received money from the estate of Sarah Utermehle as late as 1899; that he has seen Mr. Handy's handwriting on many occasions.

Thereupon witness was shown two checks dated April 25, 1899, and said that the endorsements thereon appeared to be in the handwriting of Mr. Handy; that they are not in the handwriting of witness.

Thereupon counsel for the caveatees offered said checks in evidence, and they are as follows:

"WASHINGTON, D. C., *April* 25, 1899.

The Central National Bank of Washington, D. C.,

Pay to the order of Charles H. Handy, att'y for Charles H. Utermehle, two hundred and twenty-nine 79/100 dollars,

(Stamped:) Apr. 28, 1899.
$229.79. ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices of Sarah Utermehle.

161 Endorsed: Pay to the order of Rose M. Taylor. Charles W. Handy, attorney for Charles H. Utermehle. Rose M. Taylor. Nat'l Bank of Washington, April 28, 1899, Washington, D. C."

"WASHINGTON, D. C., *April* 25, 1899.

The Central National Bank of Washington City

Pay to the order of Charles H. Utermehle, seven hundred and seventy 21/100 dollars.

(Stamped:) Apr. 26, 1899.
$770.21. ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices of Sarah Utermehle.

Endorsed: Charles H. Utermehle, by Charles W. Handy, att'y. Charles W. Handy."

The witness also identified as signed in Mr. Handy's handwriting a receipt which was exhibited to him by counsel for caveatees, and by them offered in evidence. The same is as follows:

"Check	$770.21
Taxes Mrs. T	229.79
	$1000.00

WASHINGTON, D. C., *April* 26, 1899.

Received from Rose M. Taylor and Mamie E. Norment, executrices, one thousand dollars on account of distributive share
162 estate of Sarah Utermehle.
$1000. CHARLES H. UTERMEHLE,
By CHARLES W. HANDY, *Att'y*".

Witness stated that Mr. Handy never made known to him that he collected these amounts.

Witness was thereupon shown by counsel for caveatees another check dated August 4th, 1899, and stated that the endorsement thereupon of Charles W. Handy is in his opinion the genuine handwriting of the latter. The said check was accordingly offered in evidence by counsel for the caveatees, and is as follows:

"WASHINGTON, D. C., *August 4th*, 1899.

The Central National Bank of Washington City

Pay to the order of Charles W. Handy for Charles H. Utermehle, one thousand dollars.

(Stamped:) Aug. 4, 1899.
$1,000.

ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices Sarah Utermehle.

Endorsed: Pay to the order of Charles W. Handy and M. F. Morris, executors. Charles W. Handy, attorney for Charles H. Utermehle. (Stamped:) The Riggs national bank, Washington, D. C., August 5, 1899. For deposit credit Charles W. Handy and M. F. Morris, executors."

163 The witness also identified Mr. Handy's handwriting to a receipt dated November 6th, 1894, which counsel for caveatees offered in evidence, and which is as follows:

"WASHINGTON, D. C., *November 6th*, 1894.

Received of Thomas P. Woodward, three thousand nine hundred and ninety-three 50/100 dollars, in full for my distributive share in the proceeds of the sale of Pioneer mills sold under deed of trust held by estate of Sarah Utermehle, deceased.

$3993.50.

CHARLES H. UTERMEHLE,
By CHARLES W. HANDY, *Att'y.*"

The witness also identified his own endorsement on a check dated June 16, 1893, which counsel for the caveatees thereupon offered in evidence, and which is as follows:

"WASHINGTON, D. C., *June* 16, 1893.

The Central National Bank of Washington City

Pay to the order of Charles H. Utermehle, five thousand dollars.

(Stamped:) Jun- 17, 1893.
$5000.

ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices of Sarah Utermehle."

Endorsement: Charles H. Utermehle, C. H. Utermehle, Charles W. Handy.

Stamped: Citizens' national bank of Washington, D. C., Jun- 17, 1898.

Witness stated that he did not remember where he was when he wrote the endorsement on the check of June 16th, 1893, or whether he had then recovered from the attack of rheumatism he had testified about; that at that time he was not confined to his bed, but whether he was in Washington that day or in Frederick, he could not say; that a letter might be sent by mail from Washington to Frederick on one evening and received back in Washington the next morning.

164 Thereupon the witness identified his own endorsement on another check, which was thereupon offered in evidence, and is as follows:

"WASHINGTON, D. C. *November*, 18, 1893.

The National Bank of Washington, of Washington, D. C.,

Pay to the order of Charles H. Utermehle, twelve hundred and sixty-eight 92/100 dollars.

$1268.92. ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices of Sarah Utermehle.

Endorsed: Charles H. Utermehle. C. H. Utermehle. For deposit only to the credit of Charles W. Handy, per H. E. Thyson, Jr. Stamped: Citizens' Nat'l Bank of Washington City, Dec. 6, 1893."

Witness stated that he had no recollection of foregoing check. He then identified his endorsement upon another check, which counsel for caveatees thereupon offered in evidence, and which is as follows:

"WASHINGTON, D. C., *June* 29, 1894.

The Central National Bank of Washington City

Pay to the order of Charles H. Utermehle, sixty 25/100 dollars.

(Stamped:) Aug. 12, 1894.

$60.25. ROSE M. TAYLOR,
MAMIE E. NORMENT,
Executrices of Sarah Utermehle.

165 Endorsed: Charles H. Utermehle. C. H. Utermehle. For deposit only to the credit of Charles W. Handy, per H. G. Thyson, Jr. Stamped: Citizens' Nat'l Bank of Washington City, Aug. 13, 1894."

By Mr. WORTHINGTON:

Q. It appears, Mr. Utermehle, that after you gave this power of attorney to Mr. Handy, you received, on the 16th of June, 1893 $5,000, on the 18th of November, 1893, $1268.92, and on the 29th of June, 1894, $60.25, and that they are all signed by Mrs. Taylor and Mrs. Norment as executrices. You knew when you were getting that money that it was coming from the estate of Sarah Utermehle? A. Oh, yes.

Q. I understand also, that you were fully advised on the day after, I believe you said, the death of your grandmother, that her estate was much less than you had been given to understand it was, and would be, and that you could not receive from her estate an amount which would make you equal with your aunts with respect to the whole estate of George Utermehle? A. I understood, the morning after my grandmother had died, that she used the expression, I think almost the exact words, that she had been very charitable in giving money here and there, and that if she had lived a few years longer she would have died a poor woman; but
166 there was no information conveyed to me on that day of how her property was left.

Q. But you heard her will read? A. Not that day, sir.

Q. Very soon afterwards? A. As soon as she was buried the will was read.

Witness further stated that the same people, except Mrs. Utermehle, were present at the reading of his grandmother's will who were present at the reading of his grandfather's will, and that it was read in the same place, in the parlor of their house; that Dr. and Mrs. Taylor and Mr. and Mrs. Norment, and witness and his wife, he thinks, were present; that he thinks Mrs. Norment's two children were there also, but he is not positive; that he is positive about the grown people being present; that the will was read by Mr. William R. Woodward, and that nothing was said by the witness after it was read; that witness is simply positive that the six persons mentioned were there when Mr. Woodward read the will, he making seven altogether; and that witness thinks he is as clear about that as he was about the persons who were present at the previous conversation just after the death of his grandfather.

Thereupon witness was asked by counsel for the caveatees whether it would surprise him at all to learn that Mr. Norment had been dead for two years at the time when witness said he was there, and witness replied that that was correct; that Mr. Norment was dead. Thereupon he was asked whether his memory was a little at fault in that respect, and he replied that he was speaking of the people of the family that were there. He was then asked if he was positive that the others were there, and replied that he was perfectly positive the others were there, and that it would surprise him to learn that on that day Dr. Taylor was in China; to the best of his recollection he was there.

167 Thereupon the witness identified as in Mr. Handy's handwriting the following paper, which was accordingly offered in evidence by counsel for the caveatees:

"In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

I hereby acknowledge to have received from Rose M. Taylor and Mamie E. Norment, executrices of Sarah Utermehle, deceased, the sum of thirteen hundred dollars on account of my distributive share under the will of said Sarah Utermehle.

Nov. 18, 1893.

Less overpayment on last receipt. Check being for $1,268.92.

CHARLES W. HANDY,
Att'y for C. H Utermehle.

Endorsed: Estate of Sarah Utermehle. Receipt of Charles H. Utermehle of $1,300 on account of distributive share. Nov. 18, 1893."

Witness further stated that it was approximately a year after the death of his grandfather when he sold the Young law building; that his understanding was that he received $20,000 for it; that between the time of his grandfather's death and the sale of the property Mr. Handy collected the rents for the witness.

Thereupon the witness identified a deed executed by himself and his first wife, and the same was offered in evidence by counsel for the caveatees. It is a deed dated March 24th, 1891, the grantors being Charles H. Utermehle and his wife, Sophie L., both of Frederick city, Maryland, temporarily residing in the District of Columbia, and the grantee being John T. Meany, of the city of Washington and District of Columbia. The deed conveys the
168 property known as the Young law building, in fee, the consideration named in the deed being $10. There are the usual covenants of special warranty, and it is acknowledged before Mr. Handy on March 25th, the day after it bears date.

The witness stated that he did not know why the consideration was put at $10 when it was really $20,000; that Mr. Handy got the $20,000.

Thereupon counsel for the caveatees produced another paper, the signature to which counsel for the caveator admitted to be in the handwriting of Mr. Handy. The same was thereupon offered in evidence by the counsel for the caveatees, and is as follows:

"In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

Distribution of Notes, July 1, 1893.

Total face value of notes	$231400.00	
Total accrued interest	2193.88	
One-third	$233593.88	$77864⅔

Share of Mrs. Rose M. Taylor.

Indebtedness of Wesley Zion church	$7000.00
Accrued interest from June 3, 1893	31.06
Notes of Wash. B. Williams	30000.00
Accrued interest from May 20, 1893	202.19
4 notes of James F. Barbour, $350 each	1400.00
Note of L. M. Taylor, Junior	6000.00
Note of Mrs. Rose M. Taylor	5000.00
" " " "	8000.00
" " " "	20000.00
	$77633.25
Due	231.37⅔
	$77864.62⅔

Share of Mrs. Mamie E. Norment.

Note of Laura F. Dyson	$12000.00
Accrued interest from January 16, 1893	328.00
Interest due on account prior to Jan. 16	68.50
Note of Frank T. Rawlings	10000.00
Accrued interest from April 8, 1893	136.43
Note of Frank M. Cleaver	1800.00
Accrued interest from June 13, 1893	5.03
Note of William A. Cook	12000.00
Accrued interest from June 5, 1892	712.10
Note of Burrows & Wilson	5000.00
Accrued interest from April 20, 1893	58.35
Note of F. M. Detweiler	3000.00
Notes of Charlotte Bogan	2550.00
169 Accrued interest for 15 months	191.25
Note of James F. Barbour	1800.00
Note of James F. Barbour	1700.00
5 notes of James F. Barbour, $350 each	1750.00
Note of Wash. B. Williams	5000.00
Accrued interest from June 1, 1893	24.65
Note of Mrs. M. E. Norment	20000.00
	$78124.31
Overpaid	259.68⅓
	$77864.62⅔

Share of Charles H. Utermehle, Esq.

Note of W. X. Stevens	$3400.00
Accrued interest from June 15, 1893	6.45
Note of Josephine Limerick	5000.00
Accrued interest from April 10, 1893	66.57
Note of Annie S. Lancaster	5000.00
Accrued interest from March 29, 1893	76.43
Note of Annie S. Lancaster	1000.00
Accrued interest from April 5, 1893	14.13
Note of Alfred B. Dent	5000.00
Accrued interest from June 5, 1893	20.54
Note of Madison Whipple	6500.00
Accrued interest from March 25, 1893	103.02
Note of Sarah S. Evans	6000.00
Accrued interest from April 14, 1893	75.94
Note of C. C. Duncanson	7500.00
Accrued interest from June 11, 1893	23.42
Note of Benjamin Caywood	4000.00
Accrued interest from June 25, 1893	3.28
Note of Cllan and Duffy	3000.00
Accrued interest from April 18, 1893	36.36
Note of Judge J. Muller	6000.00
Accrued interest from April 8, 1893	8.18
Note of Charles H. Utermehle	20000.00
" " "	50000.00
	$77836.32
Due	28.30⅔
	$77864.62⅔

DISTRICT OF COLUMBIA, *To wit:*

We hereby each acknowledge to have received from Rose M. Taylor and Mamie E. Norment, executrices of the will of Sarah Utermehle, deceased, promissory notes with accrued interest thereon of the value of seventy-seven thousand eight hundred and sixty-four dollars, sixty-two and two-thirds cents ($77,864.62⅔) on account of each of our distributive shares in the estate of said Sarah Utermehle.

170 Witness our hands and seals this first day of July, A. D. 1893.

—— ——. [SEAL.]
—— ——. [SEAL.]
CHARLES H. UTERMEHLE, [SEAL.]
By CHARLES H. HANDY, *Att'y.*

Attest: —— ——."

Witness stated that he thinks it will appear that Mrs. Taylor had received rather more than $20,000 and that he received the $20,000

mentioned in this paper a short time before he bought the City hotel in Frederick, which was in 1890; that he fixes the date from the fact that he used the money in buying the hotel; that he did not know at that time that it was intended to pay Mrs. Taylor and Mrs. Norment each about the same sum, and that he did not learn that they had received it until he came down to Washington in 1900. He further testified that his note for $5,000 mentioned in the foregoing paper was the $5,000 that he had spoken about that was given to him at the time the sums were made up to pay the mortgage off on his farm, and that he had already identified the check that was given to him in 1889; that he did not know anything about the $5,000 note that Mrs. Taylor turned in, and that he did not know until 1900 that when his grandmother was paying him money out of the estate she was making payments at the same time and in the same amounts to his aunts, with the exception of the fact of the $5,000 or $6,000 and something check which she gave him at that time, and that he did then understand she was giving an equal amount to Mrs. Taylor and Mrs. Norment; that this was in 1889, at the time she made up the sum for the mortgage by taking witness' note for $5,000, and giving him $5,000 and something; that she at that time said she was going to give a like amount to his two aunts; that he made no objection to that.

171 Witness was further asked whether when any of these payments were made to him, either before or after the death of his grandmother, he ever made any offer to refund or account in any way except the two letters which were read in evidence on his direct examination, one of them written to Mrs. Norment and the other to Mrs. Taylor, and he replied that this was the only offer he ever made.

Witness further testified that prior to the time his interest in the square of ground on Capitol Hill was sold under a deed of trust for $13,500, he had made no division of that square with Mrs. Norment and Mrs. Taylor; that he had not received from them any deed to him; that he had seen the signatures of his aunts several times.

Witness further stated that he dealt a good deal in horses all the time from 1884 or from 1885 on until 1895, when he went and took the City hotel; that during this period of about ten years he bought and sold horses—traded them—would make an exchange—bought and sold at auction; that he was buying and selling horses for profit, and not simply buying horses to work on the farm; that he was in this business off and on for about ten years; that sometimes he would not do anything at it for six or eight months; that he dealt between Washington and Frederick, and other places, but generally to a greater extent between here and there; that he had no special place of business; that he was on Eighth street for a long while, and then sometimes on Eighth street and sometimes on G street; that he just put up at a livery stable when he would come in here with some horses; that he would get some together, and before he would start them out to

Frederick he would leave them at a stable; that on the day the citation was served on him at Fagin's place he was at Fadeley's stable, as was natural with him in Washington, and
172 Fagin's place on Eighth street was just below there across D street, and they used to drop down there and sit there and talk; that this day in particular was a disagreeable day, and you could not do anything in the horse business; that he used to go into Fagin's, being personally acquainted with him; that he does not know of his own knowledge how it happened that when the cabman was looking for him on the day the citation was served, he went to Fagin's to find him but he does know of his own personal knowledge that the instructions at Fadeley's stable were that any time he was not there and was not out driving during the daytime, during you might say business hours, they would find him at Fagin's.

Thereupon counsel for the caveatees exhibited to witness the replication filed in this case on the 17th day of November, 1900, purporting to be signed by him, and witness admitted that he signed it and swore to it before Rutledge Willson, a notary public; that he presumes this paper was prepared by his counsel under his instructions, but governed by what they put in it; that he was not able to write the paper; that he read it before he swore to it.

Q. Mr. Utermehle, in this paper you say that not knowing your rights at the time—that is, just after your grandfather's death—"and having been misled and purposely deceived as to his rights or as to what he might expect, by misrepresentations made by the petitioner, Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment." Now, I ask you what misrepresentations you refer to there? A. Misrepresentations of the fact of the amount of personalty that was left to me, or rather the amount that was left to my grandmother under the will, the fact that she did not carry out the promise that was made to me to leave me——
173 Q. One moment—I am asking now——

Mr. PERRY: Let him answer, please.

Mr. WORTHINGTON: He is talking about one thing and not confining himself to my question.

Mr. PERRY: I submit he cannot interrupt the witness, your honor, when he is directly answering his question. He has asked him what misrepresentations he referred to, and the witness is giving the answer. I insist that he be allowed to complete it.

Mr. WORTHINGTON: Very well, I will let him go on.

Mr. PERRY: Let the answer be read as far as it has gone.

The stenographer reads as follows:

"A. Misrepresentations of the fact of the amount of personalty that was left to me, or rather the amount that was left to my grandmother under the will, the fact that she did not carry out the promise that was made to me to leave me"——

Mr. PERRY: Now go on.

A. As was stated to me in the promise on that day immediately after the reading of the will, as to leaving me so that at her death I would be equalized with the other two.

By Mr. WORTHINGTON:

Q. Is that all? A. I think that is all.

Q. What she said to you about the value of the personalty, as I understand you, was that the personalty was large enough to enable the widow to make you have the same share of the estate they had gotten under the will? A. The understanding that I had——

Q. No, no; what Mrs. Taylor said. A. Exactly what Mrs. Taylor said to me on that occasion led me to believe——

Q. One moment. I object to his stating what he was led to
174 believe.

Mr. PERRY: He has told you what she said.

By Mr. WORTHINGTON:

Q. State the substance of what she said. A. The substance of what she said was that the personal estate that had been left to my grandmother under the will was almost if not quite equal to all of the real estate that was left to them.

Mr. PERRY: And what else?

A. And that when she died she would leave me so that I would be equalized with all of them, and that pap had left his money in that way, intending that she should take care of me.

Witness on further cross-examination stated that the inference he had to draw from Mrs. Taylor's remark was that the personalty was equal or almost equal to all of the realty; that the remark itself was that by the will witness' grandfather had left to his grandmother all of the personalty and the square of ground on Capitol Hill, and that the personalty was almost if not quite equal to all of the real estate—that, in other words, his estate was like in two equal parts, half being in real estate, and half being in personalty; that Mrs. Taylor said his grandfather had left his property that way, and it was understood that when his grandmother died she would leave him in such a way that he would be equalized with them; that the inference witness drew from the conversation was that there was an understanding with his grandfather that witness should be taken care of by his grandmother out of the personal estate—that Mrs. Taylor might not have said that in exact words, but that that was the natural inference to draw from what she did say.

Witness further stated that the other thing which he called a misrepresentation was the promise that was made that this would
175 be done when his grandmother died, and that when his grandmother died he found the promise was not kept.

Witness' attention was then called by cross-examining counsel to that part of his replication above referred to in which he says that on or about the 19th day of May, A. D., 1900, he discovered the misrepresentations and fraud praacticed upon him by the petitioner, and was asked what it was that he discovered about the fraud that had been practiced upon him that he did not know immediately after his grandmother died. Witness replied:

A. Well, I found that either the statement made to me at the time

of my grandmother's death was true, or the statement that she only had $4000,000 worth of personalty was true, and if one was true, the other must have been false; and therefore it had been misrepresented to me. I found out further that the will, a matter that I did not bother to look into at that time, was made almost immediately after my grandfather's death.

Q. I am not asking about the things you discovered which led to your filing this caveat and gave you fresh information. I am asking you what it was that you discovered in 1900 in the way of fraud or misrepresentations by Mrs. Taylor that you did not know immediately after your grandmother's death? A. I didn't know anything about the misrepresentations and fraud in regard to the property, in regard to the amount of personalty that was left.

Q. What did you mean when you swore in this paper that on or about the 19th day of May, 1900, "having discovered the misrepresentations and fraud practiced upon him by petitioner"? A. The facts as laid down in that paper are to my personal knowledge. The wording of that paper was the wording of my attorneys, and I was told—I discussed those points, and they said that was proper
176 to put in that paper, and on that I signed that paper.

Q. You had gone over the matter very thoroughly, I suppose, with your attorneys? A. I had not gone over the drafting of that paper at all with my attorneys.

Q. I am not talking about that. You say you read this paper before you swore to it? A. Yes.

Q. Is it true or not that you did not discover until 1900 that Mrs. Taylor had made misrepresentations to you in 1889, in that conversation just after your grandfather's death? A. I didn't discover the circumstances and all until that time.

Q. What was it in the way of a misrepresentation that Mrs. Taylor had made to you that you discovered in 1900 that you did not know in 1893, when your grandmother died, or just after? A. As I have said before, Mr. Worthington, the discovery was made by me when I found out the facts that my grandfather had been controlled in all of his business——

Mr. WORTHINGTON: I object to that. That is not what I am asking about.

The COURT: Just answer the question, Mr. Utermehle. You can answer that question.

A. I didn't make any discoveries. Those discoveries were made by me, you might say, in 1900 or 1899.

Q. You have told us, Mr. Utermehle, that you discovered in 1893, shortly after your grandmother's death, that the promise that had been made to you, and the misrepresentations about personal property making you even, had not been kept? A. That was an
177 absolute fact at that time.

Q. You say you had discovered in 1900 that Mrs. Taylor had made misrepresentations. I want to know what they were. A. Not in 1900 she had made any misrepresentations.

Q. Very well. A. That was simply a lapse of time.

Witness further stated that the note for $750 referred to in his said replication, was on a vacant lot on the north side of M street, northwest, in Washington, between Sixth and Seventh streets; that that property was not sold to pay one of those notes; that the property was sold when it was found out that there was a note held against that property; that the date of that sale the witness thinks was along in 1884; that it was not sold to pay that note; that it was sold because there was no use, as witness and his mother understood it, to improve that property, or do anything with it, with this thing hanging over it, which almost amounted to the purchase price of the property in 1865; that it was really more than the property was worth, or almost as much as the property was worth, at that time; that the sale took place in 1883 or 1884, and that the witness was not present at the sale; that he thinks he was not in Washington at that time; that the property was offered for sale on two or three occasions and witness might have been present at one of the offers; that when the property was sold it was found that his father had no title in it, and then they had to go through a course of law to get a title, and then it was afterwards offered for sale, and finally sold on a private-sale bill; that witness' recollection is that he was present at one of the attempted sales, but remembers nobody who was there besides Duncanson, the auctioneer.

Q. This conversation you had with Mrs. Taylor, your
178 grandmother, and Mrs. Norment, just after the death of your grandfather—you speak of it in this paper I am reading from as an agreement (page 10). You say that your grandmother died without making any provision whatsoever to the end that your share might equal that of the other heirs, as had been stipulated. Do you mean to say that when this conversation took place, when this promise was made, you agreed to anything, or that it was just a promise on their part? A. It was a promise on their part, and I considered that my action at that time was in the nature of an agreement.

Q. What do you mean by that? A. My action in not making any effort, or in other words, in remaining perfectly quiet and still, making no effort to ascertain anything about the condition of my grandfather's estate, or my rights under it.

Q. Was there anything said, in substance, by them or by you that this was an understanding, that they would make this promise if you would not attack the will? A. There wasn't anything said about my not attacking the will at that time. It was simply said that I had been left out of this will, that it was through the persuasion or through the instrumentality of her, that is, Mrs. Taylor, speaking—she says: "It is through me and the Doctor that you were left the property, the Young law building;" and I am confident it was in that conversation—and possibly that took up the time of nearly an hour—that it was said the property was fixed or had just been fixed up and painted so that there would be no expense on me for repairing the property at that time; and it was

through their persuasion that such was done, and that it was understood that when my grandmother died, she would leave things to equalize me.

179 Q. Mr. Utermehle, you of course think you are answering my question? A. I think so.

Q. I will have my last question read.

The stenographer read as follows:

"Was there anything said, in substance, by them or by you, that this was an understanding that they would make this promise if you would not attack the will?"

A. The conversation was said, and I said, "Well, that's all right. I will do that."

Q. You meant by that that if you would be made whole out of your grandmother's estate when she died, you would accept the situation? A. I looked upon that as being an agreement, and I was willing to leave it to it—willing to stand by it.

Q. You say in this paper, Mr. Utermehle, "Respondent declares that by reason of the drain made upon the finances of said widow"—that is, your grandmother—"the bequests made by her to charity, her large estate was reduced from about six or seven hundred thousand dollars in 1889 to less than two hundred thousand dollars in 188?, exclusive of certain promissory notes made by her several heirs-at-law?" Is that so? A. I think that is materially correct.

Q. Then your information when you began this suit was that she did have six or seven hundred thousand dollars of personal property when this promise was made? A. Yes; I think she had a good deal more than that at the time this promise was made.

Q. Then there was no misrepresentation made to you by Mrs. Taylor as to the amount of the personal estate? A. If that statement was correct.

180 Q. You understood it to be correct? A. I relied on that statement at that time.

Q. And you say it was true? A. I believed it was true. I had every reason to believe it was true.

Q. You believe now it was true? A. I can't say I believe it now.

Q. Did you when you filed this paper believe it was true, and when you said so? A. I said I believed that it was true at that time.

Q. Up to the time, at least, when you filed this paper, which was some months after this litigation was begun, you were under the impression that what Mrs. Taylor said to you about the amount of the personal property was true? A. From what she said to me the day after my grandfather's death?

Q. Yes. A. Of course I did.

Q. You understood the real estate was in the neighborhood of twelve hundred thousand dollars? A. Yes, sir.

Q. You understood there was six or seven hundred thousand dollars of personalty? A. No; I understood at that time there was nearly a million dollars of personalty.

Q. But up to the time you brought this suit at least you thought it was in the neighborhood of six or seven hundred thousand dollars? A. I can't say where I got that exact idea.

Q. I am not speaking of where you got it. I am asking you what your belief was. A. I suppose if you put my belief in there in answer to a question, it should be put in a million dollars'
181 worth of personalty.

Q. Then so far as you were advised, when you brought this suit there was no misrepresentation made to you by Mrs. Taylor as to the amount of the personalty? A. I am not able to say whether there was misrepresentation or not.

Q. You have sworn here that she did make misrepresentations to you, have you not? A. Yes.

Q. At that time? A. Yes, sir.

Q. And when I asked you what the misrepresentation was, you said it was about the personal property? A. Yes.

Q. It appears, if I understand you, that there was no misrepresentation? A. I believe there was a misrepresentation made to me.

Q. What was it? A. I believe there was a misrepresentation made to me in regard to the promise; that that was a misrepresentation. I believe there was a misrepresentation as to the amount of personalty that was left, and I do not believe there was ever any intention to leave me as they promised me that day.

Q. I must object to what you believe about intentions. You can say what you said and what you claimed was a misrepresentation.

Mr. BAKER: Mr. Worthington, I want to call your attention to the way you asked the question. You asked the question as though he said that at that time there were six or seven hundred thousand dollars.

Mr. WORTHINGTON: I will read it again:

"Respondent declares that by reason of the drain made
182 upon the finances of said widow, the bequests made by her to charity, her large estate was reduced from about six or seven hundred thousand dollars in 1889 to less than two hundred thousand dollars in 1893, exclusive of certain promissory notes made by her several heirs-at-law."

By Mr. WORTHINGTON:

Q. You understand that? A. Yes.

Q. You did mean to say that when her husband died she had six or seven hundred thousand dollars of personal property and that when she died she had less than two hundred thousand dollars of personal property? A. I can't say I meant to say it in those exact words. Those words were put there, likely, by my attorneys; but——

Q. Your attorneys did not swear to it, did they, Mr. Utermehle?

Mr. PERRY: Go on and answer Mr. Utermehle. But what?

A. But my information and researches led me to believe, before preparing that paper, before that paper was prepared, that the sum

of the realty was every bit of a million dollars and over, and possibly, from reading the case of Norment *vs.* Norment, I got an idea and my attorney- got an idea in their heads, that the personal property was likely overestimated to me at that time. It may possibly have been put in for that purpose. I don't know anything about that; but my statement to my attorneys was always on the one line I have stated to you.

Q. I do not think I understand your position yet about this. *I want to know*, when you signed and swore to this paper, whether the information you had led you to believe, as you say here,
183 that at the time of your grandfather's death your grandmother was left about six or seven hundred thousand dollars of personal property? A. Yes, or more.

Q. That being so, I want to know what you meant by saying in the same paper that Mrs. Taylor had made misrepresentations to you when she had told you that very thing, that is, that it was to equalize you with them?

Mr. BAKER: I object to that question, because that is not what the witness has testified to. He has stated over and over again that the representation that was made at the time led him to believe that the personalty and all the real property were equal—not merely enough to equalize his share.

A. She misrepresented to me the fact of the amount of personalty, and she misrepresented to me the fact that I would be righted at that time.

By Mr. WORTHINGTON:

Q. Leave aside the latter part. What was the misrepresentation she made to you as to the amount of personalty? A. The misrepresentation was in the amount—six or seven hundred thousand dollars, or about six hundred thousand dollars, when it was represented, and I was led to believe it was a great deal more than that.

Q. Mr. Utermehle, state what she said about it. What did she say about the amount of personalty?

Mr. PERRY: He has said that three or four times.

A. She said my grandmother had left her an amount of personalty almost if not quite equal to the amount of realty. There was simply that statement, and I think those were almost the identical words.

By Mr. WORTHINGTON:

Q. The amount of it, whatever the words were, was that
184 there was enough of the personal property to make you equal to what they got? A. More than enough.

Q. And the arrangement was made that the grandmother would equalize you in that way by her will? A. Yes, sir.

Q. And you learned, when your grandmother died, that that was not going to be done?

Mr. PERRY: You do not mean that it was not going to be done. You mean that it was not done. The will, of course, had been made before she died.

A. I learned that it had not been done.

By Mr. WORTHINGTON:

Q. Just where was it you learned the contents of the will, that you were not going to get what you say had been stipulated? A. Just where was it?

Q. Yes. A. I learned it when the will was read.

Q. Did you say anything about it then? A. No, sir.

Q. Did you at any time make any complaint to Mrs. Taylor and Mrs. Norment about it? A. I don't think I made any word of complaint any more than I have particularly said. I was completely knocked out. I didn't know what to do or what to say.

Q. I ask you whether at any time you said anything to Mrs. Taylor and Mrs. Norment, or to either of them, in the way of finding fault with this not being carried out? A. I said to Mrs. Taylor, I am confident—I think it was likely the day you have alluded to that the conversation took place in regard to those little furnitures and things she had given—"You can give it all away so far
185 as I am concerned. I have got the worst of it, and I have got to stand it." I said, "I never made but one mistake in my life, and that was when I held still once before, and now I have got to stand still."

Q. You stated to her that they could do as they pleased with all of it? A. Yes.

Q. Did you say this to Mrs. Taylor, did you say? A. Yes, sir.

Q. Was anybody else present? A. I am not positive of that, Mr. Worthington.

Q. Was that the only time you made any complaint? A. That was the only time I ever made any complaint.

Q. You say in this paper that when you learned the facts, you without delay censured and upbraided both, and especially Mrs. Taylor, for her actions in this regard. That was not true about Mrs. Norment, was it? A. That was perfectly true.

Q. You say that was perfectly true, when you did not say a word to her about it? A. I never looked upon Mrs. Norment as being a party to that transaction in any way. I don't know where I got that idea. I always looked upon Mrs. Taylor——

Q. One moment. I do not ask what you looked upon. You will excuse me for not allowing you to give inferences or deductions. The question is about what you swore to in this paper. You say you without delay censured and upbraided both, especially Mrs. Taylor. I understood you to say a moment ago you never said a word to Mrs. Norment, or anything in her presence about it. A. I spoke to Mrs. Taylor, and I wouldn't be surprised if Mrs. Norment was present at that time.

186 Mr. WORTHINGTON: I object to his stating he would not be surprised, and so on, your honor.

The COURT: Confine yourself to your best recollection about this matter, and state the facts and not what you would be surprised at, or all those things. You are asked about certain facts. If you do not know the facts, say so.

Mr. PERRY: He has answered over and over again, it seems to me, your honor.

A. My best recollection is Mrs. Norment was present there, because they appeared to be over there all the time, at that time, when I went over there. My recollection is that she was there. I know I told them both I thought I had been treated very badly and very unjustly.

Q. Why did you say then a few minutes ago that you had no recollection of saying anything to Mrs. Norment or in her presence about it? A. I haven't any direct recollection, but I know, I am positive, whenever these conversations took place, they were both present. I am almost confident of it.

Q. You also say, in this paper, that "before having an opportunity to consult counsel, respondent was stricken dangerously ill and confined to his bed in Frederick." As a matter of fact, you were down here for about ten days, and entirely well, after your grandmother's death, were you not? A. I was down here about ten days, but in the meantime I think I was at Frederick and back here again, and I was not entirely well and absolutely well even at the time of my grandmother's death.

Q. You were well enough to be going around all the time? A. Oh, I was going about; yes.

187 Q. You were well enough to go up and see Mrs. Taylor and Mrs. Norment and upbraid them, as you say, for their conduct. You have just been telling us about that, have you not? A. Oh, I was well enough to get about at times.

Q. You were well enough to go up there and make an arrangement with them that they should carry out Mrs. Utermehle's wishes about something that was not in her will? A. If I was asked to go anywhere, I generally tried to go.

Q. You were well enough to do that, then, were you not? A. Yes, sir.

Q. You were well enough also to support the proposition that you should be made an executor with them, so as to get an equal share of the commissions? A. I was taken, as I said, Mr. Worthington——

Q. One moment? A. I might have been well enough at that time; but I was taken suddenly sick. I had no intention of remaining in Frederick when I was taken sick.

Q. That is not what I am asking you, Mr. Utermehle. You would save a great deal of time if you would only answer my questions. What I am saying is, reading from your sworn paper in this case, that after the death of your grandmother, "before having an opportunity to consult counsel, respondent was stricken dangerously ill,

and confined to his bed in Frederick." You were here going about for ten days after your grandmother's death, were you not? A. I was here for about ten days.

Q. What was there to prevent you from consulting counsel, if you had wanted to, during those ten days? A. Well, I didn't get my mind together. I was in Frederick, knocking around, during those ten days and back again.

188 Q. Whether you were in Frederick or anywhere else, what was there during those ten days to prevent you from employing counsel? A. There wasn't anything to prevent me if I had known what I know now.

Q. Then why did you simply swear that you did not have any opportunity to consult counsel because you were stricken dangerously ill? I understand you to say now the reason you did not consult counsel was that you did not know anything to consult them about. A. I understood at the time that paper was written that that was more a figure of speech in there than anything else.

Q. These were figures of speech? Very well. When your counsel prepare papers for you and you sign them and swear to them, you do not pay any attention to whether they are true or not, then? A. I swore to the material and absolute facts, as I understood them in there.

Q. You say next, you were stricken dangerously ill and confined to your bed in Frederick, Maryland, in a critical condition for a period of six weeks or more, after which, as a result of said illness, you remained in a greatly impaired physical and mental condition for over two years. That is so, is it? A. That is materially so; yes, sir.

Q. "Your respondent continuing during said period to be unable to transact or enter into business details, remained at his home in Frederick without being advised of the matters and things aforesaid affecting the validity of the alleged will of George W. Utermehle or his rights in the premises, as set forth, or of what was being done or had been done in connection with said estate in the court of

189 the District until November, 1899, when, after many years' residence away he returned to the city of Washington." Is that true? A. In a way it is, and in a way it is not absolutely true to the letter; but it is true in fact.

Q. Explain what you mean by being true in fact and not true to the letter? A. Well, I was all over this part of Washington, or rather all around the country, to a great extent, for a year or two, travelling around, and not paying any attention to business or anything of any kind; and it was not until I took the City hotel in 1895 that I got right down to business and attended strictly and absolutely to business.

Q. Then during those two years after your grandmother's death you were knocking around from one place to another. It was not because you were sick? A. I was sick, yes, sir; but I was able to get about.

Q. You were going around to various places, I understood you to say? A. I was around trying to make a living for myself.

Q. In your testimony here, on page 303, before this jury, you said, did you not: "I was sick in bed with rheumatism for possibly five or six weeks, and I was really, for eighteen months after that, more or less subject to limping and walking around and having pain—rheumatism, and so on"? A. Yes, sir; that is correct.

Q. Then your limping and having rheumatism did not prevent you from going around over the country during that time? A. No, indeed.

Witness, on further cross-examination, stated that in 1893 his wife and children were living at the farm in Frederick, and he
190 believed at Atlantic City for a while; that during the same period witness was in Washington and at different places—that when he was in Washington he was living at his mother's; that in July of that year, witness went to Detroit to a reunion of the Order of Elks, and also went to Chicago to the World's fair, and was there twenty-four hours—simply a little trip around—and that he came back by way of New York to Atlantic City and Philadelphia; that this was all one trip, and that it lasted about ten or fifteen days; that in the last six months of 1893 the witness was also in Philadelphia on two or three occasions, where he went to buy horses, and that he sold a lot of horses on one occasion; that during the same period he was at the Rockville fair, and he believed that he was at the Hagerstown fair, and that he went to both of these fairs in the horse business—to show horses; that he would not be positive whether he was at York in the fall of 1893 or not, but that he went to Baltimore on two or three occasions on the same business; that during the six months which followed the death of his grandmother, and after he got over the rheumatism, he was attending to the horse business in Philadelphia, in Rockville, in Hagerstown and in Baltimore. Upon being remin-ed by cross-examining counsel that this was the time when he said in his replication as an excuse for not attending to his will business that he was so sick he could not attend to business, the witness said: "I was sick so far as attending to business was concerned. I could attend to the horse business all right, because that didn't involve any particular amount of business," that it does not take a very good business man to deal in horses; that during this time the witness' headquarters were in Washington, where he was living with his mother at 1132 12th street; that he was not able to say who besides himself and his mother composed the household at that time; that he went to his mother's house every day of his life when he was in Washington, but presumes
191 he didn't eat a meal in her house the whole time; that he might possibly have eaten a lunch there if he happened to drive up there; that witness was in washington backwards and forwards for about ten days after the death of his grandmother, which would bring it down pretty near to the first of April; that he had an attack of rheumatism, and was out again about the middle or latter part of June; that he went to Detroit about the 28th or 29th of June, to the reunion there, occurring in the early part of

July; that during the last six months of 1893 he kept his clothes at his mother's house, and all that, and was there, but where he got his meals was at Gheen's stable; that he slept at his mother's whenever he was at Washington; that he is not able to say who composed the family at his mother's house during this period; that his mother kept boarders then; that during this period he used to get his breakfast at Harvey's, and was always at the stable at half past six or seven, sometimes earlier; that during this period he was attending to the horse business in Washington whenever he was in Washington, and that he was here in Washington except when he was going off on these business trips, and that during these years he was not staying with his family at Frederick at all—was not in Frederick.

The witness further stated, on his cross-examination that he went to the office of the register of wills and signed a waiver of citation, and it was after he had signed the waiver that the remark was made about that being worth a hundred thousand dollars to him, and before he signed the waiver Mr. William R. Woodward said to him: "Your grandmother is here, and would like to take letters on your grandfather's estate today, and we would like for you to sign this paper;" that the only people that witness saw there that day were his two aunts and his grandmother and Mr. William R.
192 Woodward; that to the best of his recollection there was no one else there but those six people who composed his party; that the witness does not think, but is not absolutely positive, that the judge was on the bench that day.

Thereupon the witness was shown the waiver of citation and identified his signature thereto, and then the cross-examination proceeded as follows:

Q. If I understand correctly what you have heretofore testified to, when you went to the register of wills' office to sign this paper, you had entered into this arrangement with your grandmother and your aunts that they should see you made whole when your grandmother died, and that you had told them it was all right, and you did not intend to make any trouble or opposition? A. Yes, sir.

Q. So that you were perfectly willing to have the will go to probate, and to have your grandmother take out letters with that understanding? A. Yes, sir.

Q. It was not necessary, therefore, to induce you to come there and sign the paper, because you had already agreed to let things go. Is that correct? A. That is correct.

Counsel for the caveatees thereupon read the waiver of citation in evidence to the jury.

Q. In the paper which I have been reading from, Mr. Utermehle, you say "Referring to the statements touching the alleged waiver of citation"—that is, this paper I have just been reading— "signed by him to the will of George W. Utermehle or the probate thereof as to personalty, respondent says that at said time he was in a very weak

physical and mental condition, and was not himself." What
193 you mean by that? A. Well, I was not feeling so good, and I possibly had taken a couple of drinks that day. I know I was not feeling well.

Q. Then you go on and say that you were taken at great haste in a cab to the court-house where you met Dr. Taylor and Samuel Norment, "who presented to him a paper which he was assured not only did not prejudice any of his rights, but the signing of which would be worth to him at least one hundred thousand dollars, and which he signed without reading and knowing the contents thereof, but has since been advised was in fact the waiver referred to." In view of the fact that you had not made any opposition to that will, and had not at that time any intention of making any, and that this representation about one hundred thousand dollars was not made until after you signed the paper, why did you make that statement in there? A. I stated all the facts to my attorneys, and they wrote that matter, and I signed it as material facts were embraced in it.

Q. You say you told them the same thing you have told here, did you? A. Yes, sir.

Q. And there was no reason or motive for putting in there that you were in weak mental and physical condition, because if you had been perfectly sound and had had the advice of a lawyer, you would have done the same thing, would you not, so far as you know now?

Mr. PERRY: Except that he did not know the fact.

Q. You had said that it was all right, that you understood your grandmother would make things all right, and you would let things go along. You had said that, and that was your feeling at that time? A. I had said that; yes.

194 Q. I have here the letter you wrote to Mrs. Norment, one of the two that have been put in evidence. You say: "I hereby tender myself ready to account upon demand to both you and Mrs. Taylor for the one-third interest to which each of you in such case are entitled as two of the heirs-at-law of George W. Utermehle, in both said property"—that is the Young law building—"and the rents and profits from same, from the time of the latter's death"—that is your grandfather's death. You meant by that, did you not, that you were ready to be charged with it when you would come to settle up the estate? A. No; I meant that I was ready to produce the property.

Q. And ready to turn over the money, the rents and profits? A. I was prepared at that time to carry out that letter.

On further cross-examination, the witness stated that he had no showing of what the rents and profits he had received from Young law building between the death of George W. Utermehle and the time he sold it, amounted to; that he had never figured it up; that he supposed that at the time he was testifying it amounted to about ten thousand dollars—that the property rented for about $85 a month when he owned it.

Q. And you think you got $10,000 out of it in two years?

Mr. PERRY: Two years?

Mr. WORTHINGTON: I am talking about Young's law building.

Mr. PERRY: But he got it at the time of the grandfather's
195 death and had it down to 1900, down to the time of the tender.

By Mr. WORTHINGTON:

Q. I am talking about the rents you collected before you had sold it. A. That would have been about $1,800.

Mr. PERRY: He is talking about the rents he would have collected if he had kept it all the time.

Mr. WORTHINGTON: I am asking him about the rents he had collected before he sold it.

A. That would have been about $1800.

Thereupon the witness was asked by counsel for the caveatees whether he had the $1800 ready to pay over, and he replied that he could have gotten it; that he had made arrangements with Mr. Lambert to get that money as soon as he wanted it; that he did not know of his own personal knowledge who was to advance the money; that it was not simply his intention that he should be charged in his account with the amount that he got if he succeeded in breaking the will; that when he said in the paper filed by him "that as a matter of fact what portion he took of the estate of Sarah Utermehle was taken by him as one of the heirs-at-law of both George W. Utermehle and Sarah Utermehle for which he is willing to be charged as part of his said distributive share," that that was what he was willing to do, but the letter was written, and he agreed in the letter to deliver back that property and that supposed legacy of that $750 note; that witness presumes the replication in question was prepared after there was another move made in this case, that changed its complexion; and that the arrangement as to obtaining money to carry out the offer made in the letters to Mrs. Norment and Mrs. Taylor was with Mr. Lambert—the arrangement for obtaining the property or to get the property was through Mr. Handy. Witness knows nothing about it except what Mr. Handy
said, and as to the arrangement through Mr. Lambert, has no
196 knowledge except what Mr. Lambert told him.

(It was subsequently stated by the court that the foregoing statements by the witness were in evidence, but whatever was told him by Mr. Lambert or Mr. Handy on this subject should go out; whereupon counsel for the caveator stated that they agreed that they would have to have Mr. Lambert and Mr. Handy on the stand, of course.)

The cross-examination of the witness being resumed, he stated that he had made no arrangement whatever about the subdivision of the square when his grandfather died with his aunts, and never had executed any paper in regard to that; that he had

no interest and no connection or anything to do whatever with any subdivision, if one was ever made, and that he was opposed to any subdivision being made to that property, and never executed any deed looking to conveying to his aunts his interest in the part which was to go to them.

Thereupon counsel for the caveatees exhibited a paper to the witness, which he admitted bore the genuine signature of himself and of his wife, and that he knew Carroll D. Judson, the notary public who certified to the acknowledgment of the same; that Mr. Judson's office, ever since the witness knew him, has been with the District Title Insurance Company, in Washington, of which Mr. Carusi was president at that time.

Thereupon counsel for the caveatees offered said paper in evidence, which said paper purported to be a deed, dated October, 1895, between Rosa M. Taylor and Leroy M. Taylor, her husband, and Charles H. Utermehle and Helen Utermehle, his wife and Mamie E. Norment of the second part, and conveying to her the following property, being one of lots 19, 20, 51 to 51, both inclusive in square No. 765, according to a subdivision of said square made by Rosa
M. Taylor, Mamie E. Norment and Charles H. Utermehle
197 & 198 and recorded in Subdivision Book — page — of the records
of the surveyor's office of the District of Columbia.

199 Thereupon counsel for the caveatees exhibited to the witness another similar conveyance, and witness admitted that his signature and that of his wife thereto are genuine.

Counsel for the caveatees also offered this paper in evidence, it being a deed in all respects like the foregoing deed, except that by it Mrs. Norment and her husband and Charles H. Utermehle and his wife convey to Mrs. Taylor their interest in certain other lots in the same square.

(It was admitted by counsel for the caveatees that neither of these deeds had ever been recorded, and that the subdivision referred to therein had not been recorded at the time the deeds were executed.)

Witness on further cross-examination stated that he had no direct recollection of executing the foregoing deeds or either of them, and that he executed papers for Mr. Handy on many occasions when Mr. Handy told him to do it.

Witness was then shown another deed like the two deeds next before referred to except that it purported to be a conveyance from Mrs. Taylor and her husband, and from Mrs. Norment and her husband, to the witness of their interest in still other lots in the same square, and the witness stated that he knew nothing of its execution.

Witness further stated that his interest in said square was sold under a deed of trust for over $13,000, but he was not definite about the time of sale, but thinks it was some time in 1898; that he was not present at the sale; that the creditors secured by the deed of trust were a Mr. Stokes, who is the cashier of the Rockville national bank, and a Mr. Stoner, who was an attorney-at-law in Frederick, Maryland; that this deed of trust was on the witness's undivided one-third interest in the square.

Thereupon counsel for the caveatees offered in evidence a certified copy of said deed of trust, dated December 29th, 1893. Counsel for the caveator stated that if this deed was offered simply for the purpose of showing that the witness made the deed of trust upon his undivided interest in the square there was no objection to it,
200 but that if it was offered for any other purpose counsel for the caveator would object to it. The court held that if it was competent for any purpose it might be admitted, and that counsel might discuss for what purpose it was competent afterwards. Counsel for the caveatees stated that he did not in any way limit himself in offering the paper; and thereupon the court held that as it was admitted by counsel for the caveator that the paper was competent for one purpose the court would have to admit it and discuss the extent to which it would go thereafter. And accordingly the court admitted the paper in evidence generally, to which general admission counsel for the caveator then and there excepted.

Thereupon counsel for the caveatees offered in evidence another deed of trust dated September 3rd, 1896, to which paper there was the same objection, the same ruling, and the same exception as to the deed last before mentioned.

The first of said deeds of trust is dated December 29, 1893, was duly recorded in the land records of the District of Columbia, December 30, 1893, and was between Charles H. Utermehle, unmarried, of the city of Washington, in the District of Columbia, party of the first part, and Eugene Carusi and Henry E. Davis, of the same place, parties of the second part. It recites that the party of the first part is justly indebted unto Richard H. Stokes and Charles W. Handy, trustees, in the full sum of $11,773.50, for which amount he had given his promissory note, payable on or before two years after date, to the order of Stokes and Handy, trustees, with interest, etc. It then recites that Charles H. Utermehle desires to secure the payment of the note, and therefore has granted and conveyed his undivided one-third interest in square numbered 765 in the city of Washington, to secure the payment of the note, the terms of the trust being those usual in such cases.

201 The second of said deeds is dated September 3rd, 1896, and was duly recorded in the land records of the District of Columbia on the same day. It is between Charles H. Utermehle and Helen Utermehle, his wife, of the city of Frederick, State of Maryland, parties of the first part, and William R. McCloskey and Paul F. Grove, of the city of Washington in the District of Columbia, parties of the second part. It recites that Charles H. Utermehle is indebted unto John W. Shafer in the sum of $1500, for which he had given his promissory note payable six months after date. The deed then conveys in the usual form Charles H. Utermehle's undivided one-third interest in all of said square 765, to secure the payment of said note.

The cross-examination of the witness being resumed, he testified that in the spring of 1887 his grandfather authorized him to sell the tract of land in the country containing twenty-seven acres, for

$5,000 with an indication that he might take less. The witness was then in the real-estate business here with Mr. Newcomb; that witness turned this matter over to Mr. Newcomb, who said he would attend to the matter; that Mr. Newcomb attended to all those matters, he being well acquainted in Washington and the witness not; that witness does not know anything was ever done under that authorization; that Mr. Newcomb died about eighteen months before witness testified.

Q. You reported the authorization to your partner with a view of having him attend to it and see if he could earn a commission? A. Exactly.

Q. Now I want to know if at that time you were of the opinion that your grandfather had sense enough to put a piece of property in the hands of a real-estate agent for sale and authorize him
202 to sell it? A. I saw very little of my grandfather those times. The day I talked with him everything seemed to be all right.

Q. You acted upon that authority, as giving you the power to sell that real estate as his agent, did you not? A. Yes, sir.

Q. And you gave it to your partner for that purpose? A. He didn't give it to me as his agent to sell that property. He simply said to me that he had this property, that he was anxious to get rid of it, that it was not bringing him any interest and was causing him a great deal of trouble and would take $5,000 or possibly less for it.

Q. He knew you were in the real-estate business here then? A. Oh, yes.

Q. I say, acting on what he said to you at that time, you put the property into the hands of your partner for sale and it did not occur to you at that time that your grandfather did not have mind enough to authorize the sale of a piece of property, did it? A. No, sir; it never entered my mind.

On further cross-examination witness testified that he supposed he took his first drink along in 1885 or 1886, possibly 1887; that it was after he had gone to Frederick in 1883; that he was sure it was before 1887; that he lived in Frederick then and was there all the time; and he knows from the law of Frederick he was not allowed to have a drink until he became twenty-one years of age; that the law referred to was the law which prevented a saloon-keeper from selling to a person who was a minor, but that there was no law preventing the witness from taking a drink in the house of a friend or relative; that the witness' first drink of whiskey was taken on one occasion when he was over at his grandfather's house, and his grandfather asked him to come along and go on with
203 him, saying: "Go on and take on-. It won't hurt you;" that his grandfather went into the yard and got the pitcher of water and started to go on, and called to witness to come on and take a drink with him; that witness got in there with him and his grandfather reached on the mantel and took the glass down and the bottle, and said to witness: "You take a drink;" that his grandfather didn't seem to be drunk that day at that time; that this was

possibly 1886, or 1885. witness is not positive about the time. After he became large enough to go around by himself witness visited Mrs. Norment once on New Year's day, and he thinks that was the only time prior to his grandfather's death that he was ever in her house. He does not think he was over there between his grandfather's and his grandmother's death; that he was there once—went to see Mrs. Norment once since 1895, just when it was he cannot say—he went there only once after his grandmother's death; witness further said that a short while ago he went to see Louisa Smith, who used to live in the house with his grandfather and grandmother, and said he did not tell her on that occasion that he was taken sick with rheumatism on the day of his grandmother's funeral, or on the day after his grandmother was buried.

Witness further said that Mr. Eugene Carusi had been for a long time a friend of his; that he was not a relative; that Mr. Carusi has been a friend of his mother's, and from that apparently the friendship between him and witness commenced at the death of witness' father; that witness was eighteen months old when his father died, and was not able to speak on the authority of that, but he knows there has always been a great friendship; that he had seen very little of Mr. Carusi in his life, but whenever he met him and had occasion to speak with him he was always extremely friendly with him; that he had no recollection of seeing Mr. Carusi a day
204 or two after his grandfather's funeral, and did not recollect going to Mr. Carusi's house on the evening of the day after his grandfather's funeral when he had the conversation with his grandmother and Mrs. Taylor and Mrs. Norment.

Witness was then asked on further cross-examination, if he knew a man named William L. Rose. Counsel for the caveator objected to this question unless the purpose of it was stated; whereupon counsel for the caveatees referred to the witness' prior testimony as to his physicial and mental condition for some months after his grandmother's death, and to his statements in the replication filed by him in this case to the effect that after his grandmother's death he was sick in bed with rheumatism for five or six weeks, and was really, for eighteen months after that, more or less subject to limping and walking around and having pain; and also to the witness' prior testimony that during this time he was troubled about financial matters and private affairs. Counsel for the caveatees stated in this connection that during the time in question witness was associated in Washington with William L. Rose. The court held that the pending question was only a preliminary one, and allowed it to be asked. To which ruling counsel for the caveator excepted, unless the statement was made by counsel for the caveatees as to what he proposed in that connection. Witness thereupon stated that he knows William L. Rose.

Q. How long have you known him?

To this question there was the same objection, the same ruling and the same exception.

The witness answered that he first met Rose in 1887, and did not

see anything more of him for several years; that he then saw him again, and had not seen him for seven or eight years or more.

205 Q. I will ask you whether you remember going with him in the year 1893 to the house No. 1310 C street, northwest, or to a house on C street northwest in this city between 13th and 14th streets?

To this question counsel for the caveator objected unless it was stated what it was proposed to prove in that connection. Counsel for the caveatees stated that it was his purpose to show that during the period in question the witness was not disabled. The court ruled that it was competent on cross-examination to show where the witness was after his grandmother's death in 1893, and what his condition was, and what was his health of body and mind, and that it was competent if it threw any light on that question, even if it did reflect on the witness' morals.

Thereupon counsel for the caveatees stated that since the court had ruled the evidence was admissible for the purpose stated, counsel for the caveatees now offered it for the other purpose, and asked leave to cross-examine the witness for the purpose of throwing light upon his character and therefore upon his credibility as a witness.

After full argument by counsel for the respective parties the court held that the question was competent, and permitted it to be answered against and over the objection of counsel for caveator. To which ruling counsel for the caveator then and there excepted.

Thereupon the witness answered that he never did go to the house in question with Rose.

Subject to the same objection, ruling and exception, the witness was further asked whether he knew a woman named Nellie Larone; he stated that he did not.

The witness was then asked by counsel for the caveatees

206 whether or not the termination of the relation of husband and wife with his former wife was after a decree of divorce, to which question counsel for the caveator objected, that it was irrelevant and immaterial whether he was divorced from his wife or not. The court held the question to be competent, to which ruling counsel for the caveator duly excepted, and the witness answered against and over the objection of counsel for caveator, that the relation in question was terminated by divorce.

Witness was then asked where the divorce was obtained, and subject to the same objection, ruling and exception, he answered that he was divorced in Frederick, Maryland.

The witness was then asked by counsel for the caveatees whether when the divorce suit was pending in the month of December, 1893, he went with this man Rose to any houses of prostitution, or to any house of prostitution, in Washington. To this question counsel for the caveator objected on the ground that it was irrelevant and immaterial, and therefore improper on cross-examination. The court ruled that the question was competent, to which ruling counsel for the caveator duly excepted. Whereupon the witness stated, over and against the objection of counsel for caveator, that he was with

Rose one night; that he and Rose went into a house together—that it was in the fall or early winter.

Thereupon counsel for the caveator excepted to the answer and move- that it be stricken out on the ground that it was irrelevant and immaterial; but the court overruled the motion, to which ruling of the court counsel for the caveator duly excepted.

The witness thereupon stated that the visit of Rose and himself referred to, was some time in the fall or early winter of 1893, and that it was before the divorce was granted.

207 The witness was thereupon asked by counsel for the caveatees whether during the six or ten months preceding December, 1893, he and Rose were in several houses of prostitution in Washington together, kept by both blacks and whites.

To this question there was the same objection, the same ruling and the same exception.

Thereupon the witness answered that he thought that was the only time he was ever with Mr. Rose at that time or at any other time in a house of that description—that it was on a Sunday night.

The witness was then asked by counsel for the caveatees without reference to whether Rose was with him or not, whether he was not visiting such houses during those months in the latter part of 1893; and to this question there was the same objection, ruling and exception. The witness answered that he did not know that he made a habit of visiting them; that he presumed that he went there like every one else some time in his life, once or twice during that year.

The witness further testified that between the time of his recovery from the attack of rheumatism about the first of June or thereabouts, 1893, and the time the divorce was granted in the following December, he did not visit houses of the kind mentioned around here in Washington—that the visit spoken of with Mr. Rose was made during that period.

The witness further stated that between the early part of August, 1893, and the end of that year, he was never on his farm at Frederick; that he was not at that time running the hotel in Frederick, and that he is not positive whether he was in Frederick at all during that period.

Witness further stated that at the time he sold the Young law building to satisfy his urgent needs, as stated in his replication, he owned this farm in Frederick, and that with the money which

208 his grandmother had given him after his grandfather's death he had paid off the mortgage on it; and that his grandmother had also given him between the death of his grandfather and the time he sold the Young law building the sum of $20,000 in addition; and that he then had the Young law building, which was worth $20,000, clear and free of debt; that he gave $16,500 for the farm. Being asked why, since he had the $20,000 and the $16,000 farm, he happened to be in such urgent need, witness explained that the Young law building was bringing in a precasious rental of $85 a month, and that his expenses were extremely heavy; that

there was a $16,000 mortgage on the hotel in Frederick, and his expenses were extremely heavy, and he thought that by selling the Young law building for $20,000 at that time, it would increase his income, and that the $16,000 deferred notes, which he got out of the Young law building, every dollar of that income was placed to his wife's credit to draw on that income, at the First national bank in Frederick—that he meant his then wife. Being asked if that was all the explanation he had of saying he sold the Young law building for his urgent needs, witness replied: "Urgent needs for ready money at that time, and to try to get a larger income."

209 Thereupon, further to maintain the issues on his part joined, the caveator produced as a witness WILTON J. LAMBERT, who testified, in substance, as follows:

That he is a lawyer by profession, and has been a member of the bar since 1894, and knows Charles H. Utermehle, Jr., very well, and that he is the Wilton J. Lambert who has been spoken of in the testimony as the person with whom Mr. Utermehle consulted in 1900, and that a request was made on the part of the caveator to him to obtain sufficient money to tender back to the parties what he had received under the will of his grandfather, and that witness made those arrangements, and had under his control upwards of $30,000, in cash, about $25,000 of which was money that he could use as he pleased; that he told Mr. Utermehle that the tender could be made good; that he had sufficient money to substantiate the tender and make it good, and that he would do it; that witness had the money at the time the letter was written, and for several months thereafter; that after the letter was written to Mrs. Taylor, and Mrs. Norment he did not receive any response from them directly, but he received a response through their attorneys. Mr. Woodward was always their attorney, but the first response that the witness had to the letter was through Mr. Worthington. About two or three days after the letter had been sent, witness was called into Mr. Worthington's office, and Mr. Worthington informed him that there was going to be a contest; that Mr. Woodward had been to see him representing the Taylors, and the matter was going into litigation; that witness remarked that as it was then the approach of summer they would do their best to keep them busy all summer; that the word

210 "contest" or "fight" was used in connection with the conversation, probably both, and witness was informed that the letter had been received. Had no further reply to the letter, but met Mr. Worthington once or twice after that, in the corridor of the court-house, and the conversation was confirmatory of the first conversation; also met Mr. Woodward and he talked on the same line. Having received these declarations, and having received no further response to the letters of tender, witness told Mr. Utermehle there was going to be a fight, and as they announced it there was no necessity for a further tender. Witness informed Mr. Utermehle of that first conversation, within a few moments after it occurred. Mr. Utermehle was in witness's office when he went back from Mr.

Worthington's office. On cross-examination, witness testified, when asked in regard to the $30,000, that he thinks he had about $20,000 in bank at the time; if not, he could have gotten it in a few moments. The money was in the Washington Loan and Trust Company, and in the Union savings bank, also the Lincoln bank, and some money in the Garrett County bank, at Oakland; that his idea is that his deposits at that time amounted to $25,000; that he had not looked it up but that was his idea of it; that he had other resources on which he could draw, and could have obtained $20,000 more inside of a few moments from his mother, if he had wanted it; that he had arrangements so fixed that he was able to obtain the cash the moment he saw fit to obtain it; that he could have gone to the bank at any time and gotten the $25,000, and that there is no question that he could have put it up; that he could not say he had made any arrangements when the letter was written about the $25,000, but knew if he went to the bank and asked for the money he could get it. He could have put up $45,000, or more than
211 that. The figure, however, given to Mr. Utermehle was $30,000; but he told him that they were ready to make the tender good, whatever it was.

Mr. Perry here stated that no tender had been made under the grandmother's will, but there was an offer in the pleadings to account for that part of it.

Thereupon, CHARLES W. HANDY, a witness of lawful age, was sworn on behalf of the caveator, and testified as follows:

That he was a real-estate broker, and had acted as attorney-in-fact for Mr. Charles H. Utermehle. He was asked the following question:

Q. Will you state whether in May, 1900, any request was made of you by Charles H. Utermehle, Jr., here, in connection with the procuring of an option on the Young law building? You know where that is, I suppose?

The WITNESS: I always knew it as the Young law building.

Q. At the southeast corner of 6th and Louisiana avenue? A. Yes, sir.

Q. State what you did in pursuance of Mr. Utermehle's request. A. I telephoned Mr. George J. Easterday, in the Ames building, who, I understood, had the property for sale.

Q. And did you find he had it for sale? A. He said he had to get it from Early and Lampton, who controlled it.

Q. State what you got in pursuance of that. A. I called him up a second time to ascertain what he had heard, and he said he couldn't do anything because there was a negotiation for an exchange.

Q. We do not care anything about the details of that. A. To make a long story very short, he telephoned me in a day or two he would give me an option.

Q. For how much? A. I think about $25,000, is my best recollection, and it was for a few days. Whether it was three or four days or a week, I am not sure, but it was certainly three or four days.

By Mr. WORTHINGTON:

Q. This was all verbal, was it? A. Yes, sir.

By Mr. PERRY:

Q. Did you report to Mr. Utermehle that you had that option? A. No, sir.

Thereupon, counsel for the caveator offered in evidence the paper which is alleged to be the will of George W. Utermehle, it reading as follows:

212 "In the name of God, amen.

I, George W. Utermehle, of the city of Washington, in the District of Columbia, being of sound mind, memory and understanding, considering the uncertainty of life, and being desirous of settling my worldly affairs that I may be the better prepared to leave this world when it may please God to call me hence, do therefore make and publish this, my last will and testament, in manner and form following.

I commit my soul to Almighty God and my body to the earth to be decently buried at the discretion of my executrix hereinafter named.

I give, devise and bequeath unto each of my three nieces now residing in Germany, daughters of my deceased brother, Ernst Utermehle, the sum of three thousand dollars each, to be paid to them by my executrix out of my personal estate. If they, or any of them, shall die before me, then the share or shares of those so dying shall revert to my estate.

I give and devise unto my grandson, Charles H. Utermehle, son of my deceased son, Charles H. Utermehle, the property known as the Young law building, at the southeast corner of 6th street and Louisiana avenue, in the said city of Washington, to him, his heirs and assigns, and also the interest due and to become due on the seven hundred and fifty dollars secured on lot on M street, between 6th and 7th streets, northwest, in square No. 448, in the said city of Washington, and also the principal of the said debt of seven hundred and fifty dollars.

I give and bequeath unto my beloved wife, Sarah Utermehle, all the rest and residue of my personal property, consisting of notes, bonds, mortgages, furniture, horses, carriages and securities of every kind, to be taken by her in lieu of dower, and to be disposed of by her by deed, will or otherwise, as she pleases, and I also devise unto my said wife, Sarah Utermehle, her heirs and assigns, my present residence and the property adjoining, being square numbered 765 in said city of Washington.

I give and devise all the rest and residue of my real estate, wherever situated, and all real estate of which I may die seized and possessed other than that above devised, unto my two daughters, Mamie Norment, wife of Samuel Norment, and Rosa Taylor, wife of Doctor Leroy M. Taylor, their heirs and assigns, as tenants in com-

mon, share and share alike to be equally divided between them. If either of my two daughters is unwilling to divide the said real estate, or is not satisfied with any division made, then the one who is not satisfied shall have but five dollars, and the whole of said real estate shall go to the other daughter and her heirs.

I hereby constitute and appoint my said wife, Sarah Utermehle, the sole executrix of this, my last will and testament, hereby revoking and annulling all other wills heretofore made by me, ratifying and confirming this and none other to be my last will and testament.

As I have no debts, and as my personal estate is to go to my wife, I would respectfully suggest that a very moderate bond be required of her as my executrix.

In testimony whereof, I, the said George W. Utermehle, the testator, have to this, my last will and testament, set my hand and seal this seventh day of December in the year of our Lord one thousand eight hundred and eighty-seven.

GEORGE W. UTERMEHLE. [SEAL.]

Signed, sealed, published and declared by the said testator,
213 George W. Utermehle, as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed hereto our names as witnesses on the day and year aforesaid, to wit: on the seventh day of December, 1887.

MILTON C. BARNARD.
WILLIAM REDIN WOODWARD.
WILLIAM R. WOODWARD."

Thereupon, counsel offered in evidence the certificate of the production of the will, which is as follows:

DISTRICT OF COLUMBIA, *To wit:*

On the 23d day of April, 1889, came Samuel Norment and Leroy M. Taylor and made oath on the Holy Evangels of Almighty God, that they do not know of any will or codicil of George W. Utermehle, late of said District, deceased, other than the aforegoing instrument of writing, and that they received the same from Sarah Utermehle, the widow, therein named as executrix, after the same had been opened and read in the presence of the family of testator, and said George W. Utermehle died on or about the 16th day of April, 1889.

SAMUEL NORMENT.
LEROY M. TAYLOR.

Sworn to and subscribed before me.

[SEAL.] M. J. GRIFFITH,
Notary Public for the District of Columbia.

and which is attached to the will, the same being signed by Mr. Norment and Doctor Taylor, to which offer there was objection, the objection sustained, and an exception noted.

Thereupon, M. J. GRIFFITH was produced as a witness on behalf of the caveator, and testified as follows:

By Mr. PERRY:

Q. What is your name? A. M. J. Griffith.

Q. What is your occupation? A. Notary public.

Q. State whether you are the M. J. Griffith, notary public, before whom an affidavit just set out in the record was signed. A. I am.

Q. Will you state whether or not on the 23rd day of April, 1889, Samuel Norment and Leroy M. Taylor, the two persons whose
214 names are signed to the foregoing affidavit, appeared in the orphans' court of the District of Columbia and produced and filed the paper just read in evidence, purporting to be the last will and testament of George W. Utermehle?

Objected to, objection sustained and exception noted.

Q. Did they state whether they had received the said will from Sarah Utermehle, the widow therein named as executrix, after the same had been opened and read in the presence of the family of the testator?

By Mr. WORTHINGTON: I object to that as immaterial.

The objection was sustained and an exception noted.

Mr. PERRY: I further offer to prove by this witness upon the stand that this will was produced at that time and place by Samuel Norment and Leroy M. Taylor.

Mr. WORTHINGTON: I make the same objection.

The objection was sustained and an exception noted.

Thereupon, it was stipulated and admitted by counsel for the respective parties that counsel for the caveator have offered competent evidence tending to prove that the testator, George W. Utermehle, at the time he made his alleged will in 1887, and at the time of his death in April, 1889, had real estate improved and unimproved of the value at that time of $1,000,000, and that his annual rental income from said improved real estate at those times was the sum of $55,000.

It is further admitted by counsel that in the case of George W. Utermehle there was a special bond filed, but no inventory filed with respect to his personal estate, and that no account was filed in the case of George W. Utermehle by the executrix, none being required after a special bond was given, and that it appears from the original petition of Sarah Utermehle, filed April 26, 1889, in
215 the orphans' court of the District of Columbia praying that the alleged will of George W. Utermehle be admitted to probate and record, as follows:

"The said testator died possessed of a large personal estate, which,

by the terms of the said will, is all bequeathed to this petitioner, excepting certain legacies therein named, and that independently of this there is no other statement in the probate proceedings relating to the alleged will of George W. Utermehle."

And thereupon was offered in evidence the will of Sarah Utermehle, which read as follows:

"In the name of God, amen.

I, Sarah Utermehle, of the city of Washington, in the District of Columbia, being of sound mind, memory and understanding, do make, publish and declare this to be my last will and testament in manner following, to wit:

After paying of all my just debts by my executrices hereafter named, I give, devise and bequeath all my estate, real, personal and mixed, of every kind, and wherever situated, of which I am now seized, or which I shall hereafter acquire, and of which I die possessed, to my daughters Rose M. Taylor and Mamie E. Norment, and my grandson, Charles H. Utermehle, their heirs and assigns, share and share alike.

If any one or more of them shall die during my lifetime intestate, leaving lawful issue, then such child or children to take the parents' share; if any one or more of them shall die without issue, but leaving a last will and testament, then this legacy shall not lapse, but shall be considered a part of the estate of the said decedent or decedents and shall follow the terms of the said will or wills.

I also direct that any sum or sums that I have advanced or may advance to either of my said daughters, or my said grandson, during my lifetime, shall be charged against their respective shares of my estate by my executrices.

I hereby nominate, constitute and appoint my said daughters, Rose M. Taylor and Mamie E. Norment. the executrices of this my last will and testament, with full power to sell and dispose of all my real and personal estate, in order the better to divide the same, the purchaser or purchasers under such sale or sales not to see to the application of the purchase-money, and with full power and authority to divide my estate as herein prescribed and directed, hereby revoking any and all wills heretofore made by me.

I request that the bond required of my executrices be nominal in amount, as I have no debts or claims against me.

In testimony whereof, I have hereunto set my hand and affixed my seal at the city of Washington on the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

SARAH UTERMEHLE. [SEAL.]

Signed, sealed, published and declared by the said testator, Sarah Utermehle, as and for her last will and testament, in the presence of us, who, at her request, in her presence, and in the presence of each other, have subscribed hereunto our names as witnesses.

WILLIAM RODIN WOODWARD.
THOMAS P. WOODWARD.
MILTON C. BARNARD."

216 There was also offered in evidence the order admitting said will to probate. It read as follows:

"In the Supreme Court of the District of Columbia.

In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

On consideration of the petition of Rose M. Taylor and Mamie E. Norment, and the waiver of citation by the next of kin, and it appearing to the court that the will of Sarah Utermehle, deceased, has been proven by the oath of the three subscribing witnesses thereto, and no objection having been signified to the court, it is this 17th day of March, A. D., 1893, ordered, adjudged and decreed that the said will be, and the same is hereby admitted to probate and record, and that letters testamentary do issue to Rose M. Taylor and Mamie E. Norment, the executrices by the said will appointed, upon their giving bond in the penalty of five thousand dollars, conditioned for the faithful discharge of their trust.

W. S. COX, *J.*"

Thereupon, there was offered in evidence the waiver of citation, which reads as follows:

"In the Supreme Court of the District of Columbia, This 16th Day of March, A. D. 1893.

In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

The undersigned, next of kin of Sarah Utermehle, deceased, being acquainted with the contents of the petition of Rose M. Taylor and Mamie E. Norment, bearing the date the 16th day of March, 1893, hereby waive citation or publication of advertisement so far as they are concerned, and consent that the court may act upon said petition without further notices to them.

C. H. UTERMEHLE.
ROSE M. TAYLOR.
MAMIE E. NORMENT.

Witness as to C. H. Utermehle:
EUGENE CARUSI."

And thereupon was offered in evidence the following agreement:

"In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

We, the undersigned, sole distributees under the will of Sarah Utermehle, deceased, hereby agree that the executrices under said will be, and they are hereby exempted from further accounting for the portion of the personal estate of said deceased hereinafter named and not included in the inventory of appraisers of said personal

estate returned by the appraisers, this being a receipt to said executrices for the following property:

217 1st. The horse and carriage, given to the Rev. Wm. E. Parson in accordance with the expressed wish of the said Sarah Utermehle.

2nd. One promissory note made by Wm. Oscar Roome for five hundred dollars to be given to Louisa Smith as requested by said decedent.

3rd. All the wearing apparel of said decedent.

4th. Four sets of bed-room furniture, mattresses and bed clothing

5th. The china, crockery and silverware.

6th. One horse (used by the late George W. Utermehle) and buggy.

7th. Portraits and pictures of family interest and gold watch.

ROSE M. TAYLOR,
MAMIE E. NORMENT,
C. H. UTERMEHLE,
By CHAS. W. HANDY, *Att'y.*"

And, thereupon, there was offered in evidence the petition for the probate of the will of Sarah Utermehle, which petition was in the ordinary form, and is as follows:

" Filed March 17, 1893. L. R. Hite, Register of Wills.

In the Supreme Court of the District of Columbia, This 16th Day of March, A. D. 1902.

In the Matter of the Estate of SARAH UTERMEHLE, Deceased.

Petition of Rose M. Taylor and Mamie E. Norment respect-

218 fully represents:

1. That they are citizens of the United States and residents of the District of Columbia.

2. That Sarah Utermehle, late a citizen of the United States and a resident of the District of Columbia, departed this life at the city of Washington in the said District on or about the 13th day of March, A. D. 1893.

3. That the said Sarah Utermehle died seized and possessed of real and personal property of considerable value and no debts.

4. That the decedent left a last will and testament bearing date the 5th day of July, A. D. 1895, which is herewith presented for probate.

5. That she left surviving her as heirs-at-law and next of kin, the persons whose names, residences and relationships to the deceased are as follows, to wit: Rose M. Taylor, Washington, D. C., (a daughter); Mamie E. Norment, Washington, D. C., (a daughter); Charles H. Utermehle, Washington, D. C., (a grandson, son of a deceased son).

6. The petitioners are the executrices named in the said will, and as such believe themselves entitled to letters testamentary on said estate.

Wherefore they pray: that the said will be admitted to probate and record and letters testamentary granted to them accordingly; and for such other and further relief as the nature of the case may require.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

W. R. WOODWARD, *Proiter.*

DISTRICT OF COLUMBIA, *To wit:*

We do solemnly swear that we have read the petition by
219 us subscribed and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and the facts stated upon information and belief we believe to be true.

ROSE M. TAYLOR.
MAMIE E. NORMENT.

Subscribed and sworn to before me this 16th day of March, A. D. 1893.

WILLIAM G. CLARY,
Notary Public, D. C."

Then there *was* offered in evidence the several papers filed in that case, including an inventory of the personal property, a list of notes, and the amount of money that she had on hand, and then the account of the executrices, which account shows the distribution of the estate, after the payment of certain small debts and legacies, and which account shows that said estate was divided into three parts, and that the caveator and his aunts, as next of kin, each received one-third part thereof, each receiving $84,256.87, either in money, securities or property of the said Sarah Utermehle, leaving a small amount for further distribution.

Then was offered in evidence the agreement on the part of the executrices under the will as to commissions, which said paper reads as follows:

"The undersigned executrices under the will of said Sarah Utermehle, do hereby agree and bind themselves, in consideration of Charles H. Utermehle, one of the heirs of said Sarah Utermehle, waiving all notice and consenting to the probate and filing of said will, and we charge or receive no commissions as executrices on said estate.

Given under our hands and seals on this 16th day of March, A. D. 1893.

ROSE M. TAYLOR. [SEAL.]
MAMIE E. NORMENT. [SEAL.]"

Then was offered in evidence a deed made by Rose M. Taylor *et vir* to Mamie E. Norment, dated the 18th day of July, 1889,
220 and recorded the 18th day of July, 1889, which reads as follows:

"*This indenture*, made this eighteenth day of July, in the year of our Lord, one thousand eight hundred and eighty-nine, by and between Rose M. Taylor and Leroy M. Taylor, her husband, of the city of Washington and District of Columbia, parties of the first part, and Mamie E. Norment, of the same place, party of the second part; *whereas*, George W. Utermehle, late of the city of Washington, District of Columbia, departed this life therein, on the 16th day of April, 1889, testate, and being seized and possessed of the hereinafter-described real estate, with other real estate in said District, and having, by his last will and testament, dated on the 7th day of December, A. D., 1887, and duly admitted to probate and record in the supreme court of the District of Columbia, holding a special term for orphans' court business, and being recorded in Liber 27, folio 42, in the office of the register of wills, of said District, devised all of said real estate, with certain exceptions named in said will, to his two daughters, the said Rose M. Taylor, and the said Mamie E. Norment, and their heirs, to be equally divided between them, as will more fully appear by reference to said will. And whereas, the said Rose M. Taylor, and said Mamie E. Norment, have agreed upon a partition of a portion of the said real estate so devised to them, the lots and parcels hereinafter described, being the portion thereof allotted to the said Mamie E. Norment, and the lots and parcels described in a certain deed of even date herewith from the said Mamie E. Norment and Samuel Norment, her husband, to said Rose M. Taylor, being the portion thereof so allotted to said Rose M. Taylor. Now, therefore, in order to confirm and perfect the said particion, in accordance with said agreement, this deed, and the deed of even date herewith to said Rose M. Taylor, as above described, are this day executed. Now, therefore, this indenture witnesseth: That the parties of the first part, for and in consideration of the premises, and of the sum of ten dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and do, by these presents give, grant, bargain, sell, alien, enfeoff, convey and confirm, unto the said party of the second part, her heirs and assigns, all those certain lots, pieces and parcels of land and premises, situate in the city of Washington, and District of Columbia, and particularly described, known and designated as follows: That is to say, lot lettered 'A,' of C. L. Coltman's subdivision of original lot numbered five (5) in square numbered four hundred and twenty-seven (427); lot lettered 'C,' of the Commissioners' subdivision of a part of original lots numbered one (1) and six (6), in square numbered four hundred and sixty (460); part of original lot numbered two (2), in square numbered (406), being the western part of said lot, and having a front of twenty-three (23) feet seven (7)

inches on E street, and running back the same width eighty-seven (87) feet and six (6) inches to an alley, being the same property described in a deed from Margaret E. King, dated August 14, 1878, and recorded in Liber 896, folio 128, *et seq.* of the land records of said District; lot numbered twelve (12) of the heirs of John Davidson's subdivision of square numbered three hundred and forty-two (342); the west twnety-one (21) feet five and one-third (5⅓) inches front, by the depth thereof of original lot numbered fourteen (14) in square numbered five hundred and sixty-nine
221 (569), being the same property conveyed by deed from R. Ross Perry, trustee, to George W. Utermehle, dated June 17th, 1882, and recorded in Liber 1005, folio 384, *et seq.*, of the land records of said District; the east half of lot numbered four (4), in square numbered four hundred and forty-eight (448); lot lettered 'G' of W. B. Wilson's subdivision of original lots numbered one (1), four (4) and five (5), in square numbered three hundred and thirty-seven (337); lot numbered forty (40) of Daniel S. Harkness' subdivision of square numbered three hundred and thirty-six (336); lot numbered forty-nine (49), of J. C. McGuire's subdivision of square numbered six hundred and twenty-four (624); lot lettered 'B,' of George C. Hercus' subdivision of original lots seven (7) and eight (8), and part of five (5), in square numbered three hundred and eighty-five (385); lot numbered eighty-four (84), in John Sherman's subdivision of square numbered seven hundred and twenty (720); part of square numbered three hundred and ninety-four (394), beginning for the same at the southwest corner of said square, running thence north on 9th street two hundred and twenty-four and ninety-hundredths (224 90/100) feet, to the center of the wall between houses numbered 1827 and 1829, on 9th street, thence east one hundred (100) feet, thence south two hundred and twenty-four and ninety-hundredths (224 90/100) feet, to the south line of said square on S street thence west on said line one hundred (100) feet, to the place of beginning; also part of said square numbered three hundred and ninety-four (394), beginning for the same at the northeast corner of said square and running thence south on 8th street two hundred and twenty-four and ninety-five hundredths (224 95/100) feet, to the center of the wall between houses numbered 1828 and 1830 on 8th street, thence west ninety feet (90), thence north two hundred and twenty-four and ninety-five-hundredths (224 95/100) feet, to the north line of said square on T street, thence east on said line ninety (90) feet, to the place of beginning; part of the original lots numbered ten (10) and eleven (11), in square numbered four hundred and twenty-seven (427), beginning therefor at a point on the east line of said square on 7th street, eighty (80) feet south from the northeast corner of said square, thence running south along the said line seventy-nine and ninety-five-hundredths (79 95/100) feet, to the center of the partition wall between houses numbered 918 and 920, on 7th street, thence west ninety-six and a half (96½) feet, to an alley, thence north along said alley thirty-nine and seventy-two-hundredths (39 72/100) feet, thence west three and a half (3½)

feet, thence north nineteen and eighty-six-hundredths (19 86/100) feet, thence east thirty (30) feet, thence north twenty and thirty-seven-hundredths (20 37/100) feet, and thence east seventy (70) feet to the place of beginning; the west half of lot numbered nineteen (19) in square numbered five hundred and sixty-nine (569); the north half of lot numbered fifteen (15) of E. Kingman's subdivision of square numbered two hundred and forty-one (241); part of lot numbered nineteen (19) and twenty (20) in square numbered four hundred and fifty-three (453), beginning for the same at a point on the east line of said lot nineteen (19), fifty (50) feet south from the northeast corner of said lot, thence running south thirty-five and eighty-hundredths (35 80/100) feet, thence west one hundred (100) feet, thence north thirty-five and eighty-hundredths (35 80/100) feet, and thence east one hundred (100) feet, to the place of beginning, lot numbered thirty-four (34) and part of lot numbered thirty-five (35), in square numbered four hundred and twenty-five (425), beginning for the said part of lot numbered thirty-five (35), at the northeast corner of said lot
222 on 7th street, and running thence south four (4) feet and seven (7) inches, thence west one hundred (100) feet, thence north four (4) feet and seven (7) inches, and thence east one hundred (100) feet, to the place of beginning; lots numbered twenty-three (23), twenty-four (24), and twenty-five (25) of the subdivision of lots in the square designated as square north of square numbered one hundred and seventy-seven (177), being improved by houses fronting on New Hampshire avenue, numbered 1909, 1911, and 1913, and also that part of lot numbered twenty-two (22), in said square which lies on the northerly side of the center line of the partition wall between houses numbered 1907 and 1909, on said avenue; lot numbered one hundred and ten (110) of Rawlings' subdivision of lots numbered seventy-eight (78) to eighty-two (82) inclusive, of the Commissioners' subdivision of square numbered five hundred and ten (510), improved by house numbered 242, Franklin street; lot numbered one hundred and eighteen (118), of Isaac S. Hollidge's subdivision of lots numbered fifty-six (56), and fifty-seven (57), of the Commissioners' subdivision of said square numbered five hundred and ten (510); lot numbered fifty-four (54) of Joseph H. Hollidge's subdivision of lots in square numbered five hundred and eleven (511); lot numbered seventy-two (72) of Martha E. Borland's subdivision of lots numbered fifty-one (51), and fifty-two (52), of the subdivision of said square numbered five hundred and eleven (511) lot numbered fifty-seven (57) of the subdivision of said square numbered five hundred and eleven (511); lot numbered fifty-one (51) of the subdivision of square numbered five hundred and fourteen (514), as the same appears of record in Liber 11, folio 64, in the office of the surveyor of the said District; lot numbered nine (9) of the subdivision of square numbered six hundred and thirty-one (631), as the same appears of record in Liber R. H. L., folio 118, in the said surveyor's office; lot lettered 'H,' of the subdivision of square numbered three hundred and eighty-seven (387), as the same

is recorded in Liber N. K., folio 278, in said surveyor's office; part of lots numbered twelve (12) and thirteen (13), of square numbered four hundred and forty-eight (448), beginning for the same at a point on the west line of said lots, fifteen and seventy-hundredths (15 70/100) feet, south from the northwest corner of said lot numbered thirteen (13) and running thence south fifteen and a half (15½) feet, thence east one hundred and five (105) feet to an alley, thence north fifteen and a half (15½) feet, and thence west one hundred and five (105) feet, to the place of beginning, and being improved by house numbered 1209 7th street; lots numbered thirteen (13), seventeen (17), eighteen (18) and nineteen (19), and square numbered four hundred and seventy-seven (477) of the subdivision of said square recorded in Liber 11, folio 36, in the surveyor's office of said District; all of lots lettered 'D' and 'E', and part of lot lettered 'C' in W. W. Corcoran's subdivision of original lots numbered seven (7) to eleven (11) inclusive, in square numbered two hundred and sixty-four (264), the part of said lot lettered 'C' being within the following boundaries: Beginning therefor at the northwest corner of said lot 'C,' and running thence south ten and eighty-hundredths (10 80/100) feet, to the center of the walls between houses numbered 228 and 228½ on 13½ street, thence east one hundred and five and eighty-three-hundredths (105 83/100) feet to the alley, thence north ten and eighty-hundredths (10 80/100) feet, thence west one hundred and five and eighty-three-hundredths (105 83/100) feet, to the place of beginning, being improved by houses numbered 224, 224½, 226, and 228, 13½ street; part of lot numbered ten (10) in square numbered four hundred and forty-nine (449) beginning for the same at a point on the west side of said lot on 7th street, forty-four and sixty-six-hundredths (44 66/100) feet south from the northwest corner of said lot, and running thence south twelve and a half (12½) feet, to the center of the party wall between houses numbered 1109 and 1121 7th street, thence east one hundred and sixteen (116) feet to the alley, thence north twelve and a half (12½) feet, thence west one hundred and sixteen (116) feet to the place of beginning; and lots numbered eighteen (18) nineteen (19), twenty (20), twenty-one (21), twenty-two (22) and twenty-five (25) of the subdivision of lots in square numbered four hundred and fifty-two (452), made by Rose M. Taylor and Mamie E. Norment, dated July 16, 1889, and recorded in Liber No. 16, folio 178, in the office of the surveyor of said District, and being the premises known as houses numbered 921, 923, 925, 927 and 929, on 7th street, and 628 and 636 on Massachusetts avenue; together with all the improvements, ways, easements, rights, alley and party-wall privileges and appurtenances, to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim at law, or in equity, or otherwise, howsoever, of the parties of the first part, of, in, to or out of the said land and premises. To have and to hold the said land and premises, with the appurtenances, thereto belonging, unto and to the only use of the party of the second part, her heirs and assigns forever.

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In testimony whereof, the parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ROSE M. TAYLOR. [SEAL.]
LEROY M. TAYLOR. [SEAL.]

Signed, sealed and delivered in the presence of
THOMAS P. WOODWARD.

DISTRICT OF COLUMBIA, *To wit:*

I, Thomas P. Woodward, a notary public, in and for the said District, do hereby certify that Rose M. Taylor and Leroy M. Taylor, her husband, parties to a certain deed, bearing date on the eighteenth day of July, A. D., 1889, and hereunto annexed, personally appeared before me, in said District, the said Rose M. Taylor and Leroy M. Taylor, her husband, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed, and the said Rose M. Taylor, wife of said Leroy M. Taylor, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this eighteenth day of July, A. D., 1889.

THOMAS P. WOODWARD,
[NOTARIAL SEAL.] *Notary Public.*"

Then was offered in evidence a deed made by Mamie E. Norment and Samuel Norment, her husband, of the city of Washington, District of Columbia, parties of the first part, and Job Barnard of the same place, party of the second part, said deed bearing date
224 the eighteenth day of July, 1889, and recorded on said 18th day of July, 1889 in Liber 1412, folio 133, the said deed purporting to convey to said Job Barnard all of the property mentioned in the deed of Rosa M. Taylor *et vir* to Mamie E. Norment, the deed containing among other recitals, the following: "Whereas the said Mamie E. Norment is seized and possessed in her own right and as her separate estate, of all those certain lots and parcels of ground and premises situate in said city and District and hereinafter described and conveyed, the title of which she desires to have vested in her husband, the said Samuel Norment, in fee-simple, in consideration of her love and affection for him, and other good and sufficient consideration"—said deed being otherwise an ordinary fee-simple deed and conveying that portion of the estate of George W. Utermehle that came to Mamie E. Norment with the exception of lots 8 and 9 of John Davidson's heirs' subdivision of lots in square 287, lot 2 of Coltman's executor and others' subdivision of square 277, and part of the south half of original lot 5, square numbered

343, this property having been afterwards sold by the parties and the proceeds thereof divided between them; it being agreed between counsel that the above-enumerated parcels are the ones that are excepted from said partition.

Then was offered in evidence a deed from Job Barnard, trustee, to Samuel Norment, the deed bearing date July 18, 1899, and recorded on said day in Liber 1412, folio 139. The said Joe Barnard in said deed as trustee conveys to Samuel Norment all of the property mentioned in the deeds heretofore set out reciting that "Whereas the party of the first part was empowered and directed by a certain deed of even date herewith made by Mamie E. Norment and
225 Samuel Norment to convey the hereinafter-described property and estate unto the said Samuel Norment, his heirs and assigns," the deed being a deed in fee-simple. Then was offered in evidence a certain other deed dated April 26th, 1890, made by Rose M. Taylor and husband to Mamie E. Norment, conveying part of lot 56 in square No. 511, the same being house No. 1423 Fifth street, northwest, said deed reciting that by mistake lot No. 56 in said square 511 had been erroneously inserted in the original deed. The said Mamie E. Norment, by deed dated the same day, and recorded the same day, conveyed the said part of lot 56 to Job Barnard, trustee, and Job Barnard, as trustee, conveyed the same by deed, dated the same day and recorded the same day, to Samuel Norment.

Then was offered in evidence the original bill filed in the supreme court of the District of Columbia in the case of Mamie E. Norment, complainant, *vs.* Clarence F. Norment, *et al.*, defendants, the said bill reading as follows:

Your complainant respectfully represents:

1. That she is a citizen of the United States, resident in the District of Columbia, and brings this action in her own right.

2. The defendants, Clarence F. Norment, Ida Smith, Odell S. Smith, Ellie Norment and Harry Norment, are citizens of the United States, resident in the District of Columbia. The defendants, Ulie N. Hurley and Benjamin F. M. Hurley, are citizens of the United States, resident in the city of Baltimore, in the State of Maryland. The defendants, Clarence F. Norment, Ulie N. Hurley, Ida Smith, Ellie Norment and Harry Norment are sued as heirs-at-law and devisees of Samuel Norment deceased. The defendants, James S. Edwards and Clarence F. Norment are sued as trustees and executors under the will of the said Samuel Norment. The de-
226 fendants, Odell S. Smith and Benjamin F. Hurley are sued as the husbands, respectively, of Ida Smith and Ulie N. Hurley. The defendants Ellie Norment and Harry Norment are infants, aged respectively 13 and 16 years.

3. Your complainant further shows that on and about the 16th day of April, 1889, George W. Utermehle—he being at the time of his death a resident and a citizen of said District of Columbia—died seized of a large estate in the District of Columbia, leaving Sarah Utermehle, his widow, and your complainant (then the wife of Samuel Norment), Rose M. Taylor (the wife of Leroy M. Taylor),

his daughters, and Charles H. Utermehle, his grandson, his sole heirs-at-law. By his will, dated December 7, 1887, duly probated and recorded in Will Book 27, page 43, in the office of the register of wills of the District of Columbia, a certified copy of which said will is filed herewith, marked "Exhibit A," and made a part of this bill, the said George W. Utermehle, after certain bequests, bequeathed and devised the rest and residue of his estate as follows:

"I give and bequeath unto my beloved wife, Sarah Utermehle, all the rest and residue of my personal property, consisting of notes, bonds, mortgages, furniture, horses, and securities of every kind, to be taken by her in lieu of dower, and to be disposed of by her by deed, will or otherwise, as she please, and I also devise unto my said wife, Sarah Utermehle, her heirs and assigns, my present residence and property adjoining, being square No. seven hundred and sixty-five (765) in the city of Washington.

"I give and devise all the rest and residue of my real estate wherever situated, and all my real estate of which I may die
227 seized and possessed, other than above devised, unto my two daughters, Mamie Norment, wife of Samuel Norment, and Rose Taylor, wife of Dr. Leroy M. Taylor, their heirs and assigns, as tenants in common, share and share alike, to be equally divided between them. If either of my two daughters is unwilling to divide the said real estate, or is not satisfied with any division made, then the one who is not satisfied shall have but five dollars, and the whole of the said real estate shall go to the other daughter, and her heirs."

4. Pending the partition, provided for in the above-recited will of George W. Utermehle, your complainant was advised, and repeatedly urged by her husband, Samuel Norment, since deceased, to transfer to him all of her property devised through the said will. Your complainant had very slight and imperfect knowledge as to the value of said property, being wholly unacquainted with such matters and being unskilled in business affairs, and such want of knowledge continued up to the time hereinafter indicated, in February, 1892.

She objected, however, to such a transfer, for the reason that three of the children of the said Samuel Norment were by a former wife, and she objected to their receiving the benefit of her estate, to the detriment of her two children, in the event of the death of her said husband, or in the event of disposition being made of her said property adverse to the interest of her said children. Notwithstanding her objection, the said Samuel Norment peremptorily demanded that the said property be conveyed, transferred and surrendered to him; stating that it was of small value, especially as compared with his own estate; and threatened that unless such transfer was made, he would make a will cutting off the children of complainant with five dollars. These demands were of such a nature, and so persisted in and were so accompanied by threats
228 similar to the one above stated, that by reason of them, the peace and well being of your complainant and her house-

hold were seriously interfered with; and, furthermore, your complainant trusted in the integrity of her said husband, and upon the faith of such trust, and further moved by the said action of her said husband, made the transfer hereinafter mentioned.

Induced by a desire to avoid any controversy with her husband and relying on his representations as to the value of your complainant's estate, of which she was ignorant as aforesaid, as her husband well knew, and trusting in his statements as to the advisability of vesting in him the title to the property so demanded by him, and influenced also by her confidence in his integrity of purpose in making the promises hereinafter named, your complainant finally yielded to her said husband's demand that complainant should transfer to him, by such conveyances and transfers as he should direct, all of the property devised by her father to your complainant, as hereinabove set forth, and also submitted to his appropriation to himself of complainant's personal property, as hereinafter averred.

Your complainant avers, that at the time of making said demands and threats, as hereinabove averred, and as part of the same acts, transactions and treatment, of complainant, by which he acquired the legal title to complainant's property, as herein averred, the said Samuel Norment positively and repeatedly promised and assured your complainant that he would duly make, execute, acknowledge, and leave, at his death, a last will and testament devising and bequeathing unto your complainant one-third of his entire estate, in full and absolute ownership. These promises and assurances were repeatedly made by the said Samuel Norment to your com-
229 plainant; and she, relying on said promises, and with the full expectation that, by his last will and testament, he would devise and bequeath unto her, in full and absolute ownership, in her own right, one-third of the entire estate, real and personal, of which he, the said Samuel Norment, might die possessed, submitted to the transfers of her property, real and personal, as hereinafter set forth.

Your complainant further positively avers that the said conveyances made by the deed from complainant and her husband to Job Barnard, hereinafter named, and made part of this bill, marked "Exhibit C," and also the transfers and surrender of her personal estate and money, as hereinafter named, were made and submitted to by complainant upon and for no other valuable consideration whatever, moving from her said husband to complainant, than his said promises to convey unto complainant, by his last will, in her own full and absolute right and ownership, one-third of the entire estates—including that yielded up to her said husband, as herein set forth—of which he, the said Samuel Norment, might die possessed; and that it was under the influence of the said representations as to value, the said promises and assurances as to his will, and his said threats that complainant at last yielded to said transfers and surrenders of her property, as herein averred, and but for these she would not have conveyed or surrendered her property as herein averred.

Your complainant further avers that, as hereinbefore set forth, at the time when she was induced and coerced to make the said transfers of her said estate to her said husband, she was, as her husband well knew, ignorant of the extent and value of the same, and at the time aforesaid, she was, as her husband well knew, ignorant of the extent and value of the estate of her said husband.

230 Your complainant further avers that she is informed and believes that her said husband, at the time aforesaid, was fully informed and well knew the value of complainant's said estate, and also the extent and value of his own estate, and that, at the time aforesaid, complainant's real estate was of the value of about $500,000, and that the value of the real and personal estate of her said husband was about the sum of $700,000; and that, by procuring her to convey her said estate to him, under said promises to devise and bequeath to her, in full and absolute ownership, one-third of his said estate, after having acquired her said estate, he thereby procured from her property the value of which was not less than $100,000 in excess of the devise and bequest so promised to be made to complainant.

5. In the partition of the estate of the said George W. Utermehle, the real estate described in "Exhibits B, C and D," filed herewith, and made a part of this bill, was allotted to Mamie E. Norment, your complainant, in full and absolute ownership, in fee-simple.

This allotment was agreed to, and by deed dated and recorded July 18, 1889, Rose M. Taylor, codevisee under the said will of George W. Utermehle, conveyed to your complainant all of her interest, being an undivided one-half in said property.

6. Complainant further avers that immediately upon and after the execution and delivery to complainant of the deed last above named by her sister, Mrs. Rose M. Taylor, your complainant, in consideration of the promises by her husband, hereinabove set forth, and induced by the causes above named and upon no other consideration, along with her husband, executed and delivered to Job Barnard, a deed, conveying to the said Job Barnard, in trust,

231 as expressed in said deed, all the said property and real estate, an undivided one-half of which was conveyed to complainant by her said sister, Mrs. Taylor, by deed dated the 18th of July, 1889, and recorded on the same day in Liber 1412, folio 125, for a full description of which property reference is made to said deeds, to wit, the deed by Rose M. Taylor to complainant, and the deed by complainant and her said husband to Job Barnard, which are hereto annexed as "Exhibit B and C."

The said Job Barnard, in execution and pursuance of the said trust, conveyed to Samuel Norment all the said property, by deed dated July 18, 1889, and recorded on the same day in Liber 1412, folio 139, which said deed, by said Job Barnard is filed herewith, marked "Exhibit D," and made part of this bill. These deeds, marked "Exhibits B, C and D," were filed simultaneously and recorded in Liber 1412, folios 125, 133 and 139 in the land records of the District of Columbia.

7. Complainant further avers that by error in the above-mentioned deeds, marked "Exhibits B, C and D," lot 57 in the subdivision of square 511 was conveyed instead of sublot 56 in square 511. This error was corrected by securing to complainant in her own right sublot 56 instead of sublot 57, and the title to the said lot 56 was by conveyances hereinafter mentioned, vested in the said Samuel Norment. Said deeds, *aming* said correction, are hereto annexed, made parts of this bill, and marked "Exhibits E, F and G," and are recorded in Liber 1403, folios 206, 208 and 210 of the land records of the District of Columbia.

8. Complainant further avers that in the partition of the estate of George W. Utermehle, above referred to, certain property was not allotted, and it was agreed between the parties in interest
232 that the same should be sold and the proceeds divided. Accordingly sales were made of the following-described land, to wit: Lots 8 and 9 of John Davidson's heirs' subdivision of lots in square 287 (Subdivision Book N. K., pp. 84 and 85) for $56,000, and, by deed dated the 19th of April, 1890, and recorded the 26th of April, 1890, in Liber 1483, folio 94, the same was conveyed to Edward M. Gallaudet. After payment of the expense attending said sale, viz.: $1,749.18, there remained of the purchase-money to be divided $54,250.82, of which your complainant was entitled to one-half, viz.; $27,125.41. This amount was paid to the said Samuel Norment on or about April 26th, 1890.

Lot 2 of Robert Coltman's ex'r *et al.* subdivision in square 227 (Subdivision Book W. F., p. 99) sold for $4,250, and by deed dated the 25th of October, 1889, and recorded the 26th of October, 1889, in Liber 1429, folio 232, was conveyed to Michael Murphy. After deducting expenses there remained to be divided $4,150, of which your complainant was entitled to $2,075. This amount was paid to the said Samuel Norment on or about the 26th day of October, 1889.

Part of the south half of original lot 5 in square 343, beginning 23 feet from the southwest corner of said lot and running thence north 27 feet; thence east 95 feet to an alley; thence south 25 feet; thence west 67 feet; thence south 2 feet; thence west 28 feet, to the place of beginning, sold for $4,497.33, and by deed dated the 20th of November, 1889, and recorded on the same day, in Liber 1442, folio 102, was conveyed to Charles Ford. After deducting expenses, there remained to be divided $4,378.26, of which your complainant was entitled to $2,189.13. This amount was paid to the said Samuel Norment on the 20th of November, 1889.

Your complainant was also entitled, in the settlement of the estate of her father, the said George W. Utermehle, to
233 the sum of $1,025.18, as her share of rebate on policies in the Mutual Fire Insurance Company. This amount was also paid to the said Samuel Norment by check of Rose M. Taylor, dated September 14, 1889, and was by him appropriated to his own use.

The said Samuel Norment acquired possession of each of the said sums of money, in this paragraph named, by the same means, and in virtue of the same assurances and promises under which he ac-

quired, as hereinabove set forth, the said title to the real estate conveyed, and described in said "Exhibits C and D and F and G;" and your complainant never received from the said Samuel Norment any consideration whatever for said moneys, except the said promise to make and leave a last will *will*, as above described; and your complainant suffered him to acquire and appropriate to his own use the moneys aforesaid under the same promises, demands, threats and influences which are hereinbefore set forth as to his acquisition of complainant's real estate.

9. Your complainant further avers that, in May, 1885, Samuel Norment purchased from the National savings bank, for $21,500, a house and lot in the city of Washington, situated on M street between Nonth and Tenth streets, numbered 928 M street, N. W., and which is described as "all of lot 12 in square 369, except the west 5 feet from front to rear of said lot, condemned for alley purposes;" and, by deed dated the 20th of May, 1885, and recorded in Liber 1121, folio 446, of the land records of the District of Columbia, which said deed is filed herewith, marked "Exhibit H," and made a part of this bill, the same was conveyed by the National savings bank to Samuel Norment. Only $5,000 of the said purchase-money was paid, in cash, by the said Samuel Norment; and, by deed of trust, dated May 20, 1885, and recorded in Liber 1121, folio 446, a certified copy of which is filed herewith, marked
234 "Exhibit I," and made a part of this bill, the said Samuel Norment and your complainant united in conveying the said part of lot 12 in square 369 to Benjamin P. Snyder and A. L. Sturtevant in trust to secure the promissory note of said Samuel Norment for the sum of $16,500, payable one year after date to the order of the National savings bank, with interest at five per cent. per annum payable semi-annually; said note representing the unpaid purchase-money on the property last above described. At maturity the said note was purchased by the said George W. Utermehle, and under his will, hereinbefore mentioned, it passed to his widow, Sarah Utermehle, the mother of your complainant. At or about the time of the purchase of the property last described as aforesaid, the said Samuel Norment stated that he had purchased the said property for his wife, your complainant, and on numerous subsequent occasions led various persons to believe that the said property was the property of your complainant, speaking of the said property as "Mamie's house."

After the said Sarah Utermehle had acquired, through the will of her husband, the title and ownership of the said note, the said Samuel Norment re-sented to the said Sarah that said note represented purchase-money for said part of lot 12 in square 369, and he assured the said Sarah, that said lot and appurtenances would be the property of his wife, and repeatedly made to complainant the same assurance, and the said Sarah, knowing nothing to the contrary, and believing the said statements to be true, was thereby induced to present to complainant the said note for the purpose of enabling complainant, through the surrender of the said note, to

pay the amount thereof upon and for said last-named lot and appurtenances.

235 This said note complainant surrendered to her husband in payment upon and for said lot 12 on the faith of the said former promises and assurances by said husband, made to complainant, and to her mother, that said lot should be the property of complainant; and said Samuel Norment obtained a release of the above-mentioned deed of trust, a copy of which said release is filed herewith, marked "Exhibit K," and made a part of this bill.

Subsequently the said Sarah Utermehle presented to your complainant the sum of $5,000, directing her to give the said $5,000 to her husband and request that a conveyance of the property be made to your complainant. In pursuance of this direction, and wishing to have the title of the property in her own name, your complainant did, in May, 1889, tender to the said Samuel Norment the above-named sum of $5,000, stating to him that it made, with the note of $16,500, which he had before received, the full amount of the purchase-money for the property, and requesting that the same be conveyed to her. The above-named tender is hereby continued and repeated. This request the said Samuel Norment utterly refused to comply with, declining to receive the money tendered and becoming very much enraged with your complainant, declared that he would never live in a house that was in his wife's name; and therefore said premises stood, at the death of the said Samuel Norment, in his name, but in equity belonged to this complainant.

10. The said Samuel Norment died on the 23d day of March, 1891, seized of a large estate, including all the property hereinbefore mentioned, leaving your complainant, his widow, and the defendants, Clarence E. Norment, Ulie N. Hurley, and Ida Smith, his children by a former wife, and leaving the defendants Ellie Nor-

236 ment and Harry Norment, his children by your complainant, as his only heirs-at-law.

11. By his last will and testament, dated September 17, 1889, and duly probated March 28, 1891, a copy of which is filed herewith, marked "Exhibit L," and made a part of this bill, the said Samuel Norment devised and bequeathed to the defendants James S. Edwards and Clarence F. Norment, their heirs, executors, administrators and assigns, and in case of the death, or neglect, or inability to act, or the declination or renunciation of either, to the survivor, or the one accepting the trusts hereinafter set forth and declared and to his heirs, executors, administrators and assigns, all of his estate upon certain trusts, among others the following:

"In trust, at my death, to take immediate possession, control and management thereof; to preserve and care for the same; and with full authority and power to do and perform any and all necessary acts and things for the purposes of carrying into effect the provisions of this will; and, upon taking and assuming such possession, management and control, and with as little delay as practicable, to inventory, list or schedule, and to appraise, fix and determine the value of all of my said estate and property; the moneys, stocks,

bonds, choses in action, and all of my other personal property being included and enumerated with the values so fixed and determined in one list or schedule, and the real estate by separate and distinct parcels and as particularly and accurately described as may be found practicable and convenient to said trustees or trustee with the respective values so fixed and determined set opposite or following each parcel being included and enumerated in another and separate list or schedule; and, when completed—

"First. To transfer, assign and deliver to my wife, Mamie
237 E. Norment, and as a special bequest to her, all of the household and kitchen furniture, piano, books constituting my library, paintings, pictures, mirrors, articles of virtu and household ornaments, now contained in my family residence, known as No. 928, on M street, northwest, in said city of Washington, and which may be contained therein at the time of my death or which may be within such house or dwelling occupied by me as a home at that time; also my diamond studs, my watch and chain and all of my jewelry, personal ornaments and trinkets, and my wearing apparel.

"Also to pay to my said wife the sum of five thousand dollars ($5,000) as a particular money or pecuniary legacy to her.

"Also, but subject to the payment of all my debts, liabilities, obligations and funeral expenses, and the costs of the probate of this will, and of the administration of my personal estate, and the charges and expenses connected therewith and incident thereto (not, however, including in such costs and expenses the compensation to said trustees or trustee for their or his services in executing the trusts of this will and in the premises, which will be hereinafter fixed and provided for), to pay over, assign, transfer and deliver to my said wife one-third (⅓) in value (ascertained, fixed and determined by inventory and appraisal as aforesaid) of all the rest and residue of my personal property of every character and description and wherever the same may be found or located.

"To have and to hold said household and kitchen furniture, goods, chattels and effects, the subject of said specific bequest, the said money or pecuniary legacy, and the said share or portion of all of the rest and residue of my personal property as aforesaid, unto and to the sole use and benefit of my said wife, her executors, administrators and assigns, absolutely and unconditionally.

238 "Also to set apart and to hold for the use and benefit of my said wife, during the period of her natural life, one-third (⅓) in value (ascertained, fixed and determined as aforesaid and under the provisions of this will) all of my said real estate of every character and description and wherever found or located, and to permit my said wife, during said period, to occupy such portion or portions thereof as she may desire for her own use as her home, and with the right and power hereby vested in her to rent out the same, and every part and parcel thereof, and to collect and receive all of the rents, income and revenues therefrom, and to give receipts and discharges therefor, and any and all notices to quit for the purpose of obtaining or regaining the possession of the same, or of any portion

thereof in her own name, and to do and perform any and all necessary and lawful acts and things for the full and complete enjoyment by her of the portion of real estate so directed to be set apart and held for her benefit, and the collection and recovery of the rents, income and revenues therefrom, during the period stated, my said wife, however, as such life tenant, being hereby charged with the due care and preservation of said real estate, and, at her own cost and expense, with keeping the same in reasonable repair and in a tenantable condition, with placing and maintaining a reasonable and proper insurance on all of the buildings and improvements thereon against loss by fire in the names of said trustees, or trustee, for the use and benefit of all concerned therein under the provisions of this will and with the payment of all taxes and assessments, both general and special, of every character and description, laid, charged, levied or made against said real estate, the subject of this devise for her benefit, or any part or parcel thereof; the said net rents,
239 income and revenues to be held and enjoyed by my said wife for her own exclusive use and benefit and without limitation as to her right of absolute dominion over or disposition of the same.

"I do further will and direct that, within a reasonable time after the completion of the inventory, lists, schedules and appraisement of all of my property, so directed to be made by my said trustees, or trustee, a copy thereof shall be furnished my said wife, who shall have the right and privilege within sixty (60) days after the receipt thereof by her to select and designate in writing to said trustees, or trustee, the several parcels of the said real estate, and at the values so fixed and determined, which she desires set apart and held by them, or him, for her use and benefit under the provisions of the said devise of one-third (⅓) of my said real estate during the period of her natural life as aforesaid; and, in carrying into effect the provisions of this will concerning the same, said trustees, or trustee, shall be governed accordingly, and shall follow the desires of my said wife, so as aforesaid expressed by her in the premises. On failure, however, of my said wife within the time limited, and in the manner stated, to so designate or notify such selection, I do authorize, empower and direct my said trustees, or trustee, to execute the trusts of this will in respect to the said bequest and devise to and for the use and benefit of my said wife as if such privilege of selection and designation had not been granted to her."

12. Your complainant, not comprehending the terms and purport of said will, and being at the time much disturbed in mind, and still reposing confidence in the representations of her late hus-
240 band, and fully believing that he had fulfilled his agreement and promises, hereinbefore set out, and had provided for her by the said will an interest in his estate equal to one-third of his entire estate; and, during the time from the death of her said husband until the month of February, 1892, remaining in ignorance of the character of the said will of her said husband, and not apprehending its effect, and, during the time last aforesaid, not having received any advice from counsel, or from

any person whomsoever in regard to her rights under said will, or in regard to said failure to comply with its said terms, was incapable of exercising any judgment intelligently in regard to her said rights, and was incapable, owing to her said ignorance, of taking any intelligent action touching her rights under said will; and her failure to renounce the provisions made for her in said will within the time prescribed by law was the result of her said ignorance and affliction, and of mistake on her part; and she avers that she ought not in law or equity to be bound by said failure so to make said renunciation.

13. Complainant further avers that in so far as complainant has received any moneys from the executors under said will, or done any other act tending to recognize the provisions of said will, she did the same under the operation of the same mistake, ignorance, affliction and incompetency, as is in the above paragraph set forth.

14. Your complainant further avers that under the influence of the same ignorance, affliction and mistake, as is set forth in the last preceding paragraph, she has also received from said trustees the furniture and certain other of the personal property bequeathed to her in said will, amounting according to the appraisement provided for, to the sum of $37,985.33, for which said amount she has also rendered to said trustees her receipt. Said personal property is
241 now in the possession of your complainant, who holds and will hold the same subject to the direction of your honorable court.

15. Your complainant further avers that on or about the 19th of February, 1892, the said James S. Edwards and Clarence F. Norment, trustees as aforesaid, submitted to your complainant the schedule of the real estate of the late Samuel Norment, as provided for in the above-recited will, requesting that she make her selection of the one-third of said real estate as therein provided. Upon an inspection of said schedule, your complainant for the first time became acquainted with the provisions of the will of her said husband, and of the facts thereinabove averred as to how the provisions of the will failed to comply with the representations, inducements and promises under the influence, in part, of which the said Samuel Norment secured the transfer to him of the real and personal estate of this complainant, as is hereinabove set forth.

This complainant further avers that then for the first time she became aware of the fact that her husband had grossly deceived her at the time he procured said conveyance of her property, as above set forth, in regard to its value and extent.

Your complainant further avers that the said representations made by her said husband, by means, in part, of which he induced her to surrender to him, as above set forth, her real and personal property, were, as he must have known and did know, grossly false, both in regard to the extent and value of complainant's property so conveyed to him, and he knew that complainant was ignorant as to

such value, that she was unacquainted with business, and
242 that she trusted and relied upon his said representations as to said property, and his said promises as to the character of the provisions that he would make for her in his will.

16. Complainant further avers and charges that the acts and transactions of the said Samuel Norment, as hereinabove specifically set forth, whereby he acquired the said conveyance and tran-fer by complainant of her real and personal property to him, were unjust and resulted in deceiving your complainant into making said conveyances and transfers, without any consideration whatever, except said promises to make said provisions in said will in favor of complainant, which he has failed to make, and that, by reason of all the premises herein set forth, the said Samuel Norment became, and was at the time of his death, in law and equity possessed of the said property, real and personal, so relinquished to him by complainant only in trust for this complainant, the full, equitable ownership thereof remaining in this complainant, both as to said real and as to said personal property, and that in equity said property is liable to be and is charged with said trust in the interest of complainant.

17. Complainant further avers and charges that said lot and premises, No. 928 M street, being part of lot 12, in square 369, were at the death of the said Samuel Norment, in equity the property of this complainant, subject, however, to the payment to the estate of the said Samuel Norment the said sum of $5,000 heretofore and during the life of the said Samuel Norment tendered to him as above set forth, which tender is hereby repeated and continued.

18. Your complainant further avers that she is informed and believes and charges that the compensation which the executors, James
243 S. Edwards and Clarence F. Norment, trustees, are claiming to be entitled to receive as such trustees and executors, to wit, ten per cent. on the corpus of the estate of Samuel Norment and on the income of said estate as set out in said will, is, as your complainant believes and charges, excessive and unjust, and said executors and trustees are, as complainant is informed and believes, about to proceed to sell portions of the estate of the said Samuel Norment for the purpose of paying their said fees, which, if carried out, will not only be unjust because excessive, but will also be injurious to the residue of the said estate, and the court, as complainant avers and charges, ought to interpose whatever power it may possess in the premises for the purpose of preventing the injury and injustice last aforesaid.

Wherefore, the premises considered, your complainant prays:

Prayers.

1. That the United States writ of subpœna issue to the defendants Clarence E. Norment, Ulie N. Hurley, Benjamin F. M. Hurley, Ida Smith, Odell S. Smith, Ellie Norment, Harry Norment, James S. Edwards, trustee and executor, and Clarence F. Norment, trustee and executor, requiring them to answer the exigencies of this bill;

answer under oath being hereby expressly waived. The said defendants Ellie Norment and Harry Norment are infants aged respectively 13 and 16 years.

2. That a guardian *ad litem* be appointed for the said defendants, Ellie and Harry Norment, to defend this suit in their behalf.

3. That the court shall, by its decree, set up and declare, as in favor of this complainant, a trust in all the real estate, which, by this complainant and her husband, was conveyed to the said
244 Job Barnard, as set forth and described in "Exhibit C;" and that in lieu of said sublot 57 in square 511, as named in said "Exhibit C," sublot 56 in square 511, as named in said "Exhibits E, F and G," shall be decreed to be held in trust; and that the court shall further decree that the said complainant is the full owner, in her own right, in fee-simple, of all the said real estate so conveyed by this complainant, through the said trustee, Job Barnard, to her said husband; and that, as to all the said real estate, the court shall decree, order and direct that the said executors and trustees, James S. Edwards and Clarence F. Norment, shall, within a short time, to be fixed by the court, convey unto this complainant, and to her heirs and assigns forever, all of the said real estate so acquired by the said Samuel Norment from this complainant, and that, in default of the said executors and trustees making such conveyance to complainant, the court shall make a decree that shall operate as a conveyance of said title, in all of the premises aforesaid, to this complainant.

4. That the court, by its final order herein, shall decree that the said lot and premises No. 928 M street northwest, being part of lot 12 in square 369, the same that is described in "Exhibit H," made part of this bill, is held by said executors and trustees in trust for this complainant as the full and equitable owner thereof, subject only to the payment of said $5,000, hereby tendered, and that the court, as to said premises last aforesaid, shall decree that the said executors and trustees, from and after being paid the said $5,000, shall convey the said premises to this complainant in fee-simple at a short time, to be named by the court, and in default of such
245 conveyance that the court shall make a decree in this cause that shall operate as a conveyance of said title to this complainant; and that, in making up the account hereinafter prayed for, the said $5,000 shall be charged to this complainant as a credit to the defendant executors and trustees upon the account herein prayed.

5. That the court may order and decree that this complainant is entitled to receive from the residue of the estate, both real and personal, of her said husband which was not derived by him by means of the conveyance through her said trustee, Job Barnard, or from her the said complainant and of which residue the said Samuel Norment died seized and possessed, such interest and share as this complainant would by law be entitled to receive had the said Samuel Norment died intestate; or, in the alternative, in case the court shall reach the conclusion that, for any cause, complainant

is not entitled to the share of said estate which she would be entitled to in case the said Samuel Norment had died intestate, then that the court may decree that she is entitled to receive such portion of the said estate of which the said Samuel Norment died possessed, and which was not by him derived through such conveyance by complainant to her trustee, Job Barnard, or from this complainant as is given to her by said will; your complainant hereby, in the event the court shall decree to her the interest in said estate, real and personal, which she would take in the event of the intestacy of her said husband relinquishing and tendering unto said executors and trustees all interest which she would take under said will, and hereby tendering the return of all that she has received under the operation thereof—these offers and tenders being conditional, as aforesaid, that the court shall secure to complainant what she would be entitled to had the said Samuel Norment died intestate.

246 6. Complainant further prays that an account may be taken of all the moneys herein set forth as having been received by the said Samuel Norment of the separate property and moneys of this complainant, through and by means of the false and fraudulent representations and promises of the said Samuel Norment; and also an account of all the rents and profits of the real estate of this complainant so wrongfully acquired and held by the said Samuel Norment, derived through this complainant, and also of all the taxes, and other expenses properly incurred and paid by the said Samuel Norment, and his executors, for, regarding and on account of said real estate so wrongfully acquired from this complainant, and that the balance due to the complainant, in all the premises in this paragraph named, may be by the court ascertained and established; and that the said executors, or their successors if any there should be, in said trust be required to pay to this complainant at a short date, to be fixed by the court, such balance so found to be due to complainant.

7. That the court shall ascertain and fix, by its decree in this case, what shall be the compensation of the said executors and trustees for executing their duties under the said will.

8. That, on order of this honorable court, a receiver may forthwith be appointed with full power and authority to take immediate charge, possession and control of the said estate so conveyed by complainant to the said Samuel Norment, through the trustee, Job Barnard, and with such power, in respect to the management thereof, as to the court shall seem meet and proper.

9. That the court will grant in this case an injunction, during the pendency of this suit, restraining the said executors and trustees
247 from selling, conveying or in anywise encumbering the said real estate so conveyed through said trustee, Job Barnard, by complainant to the said Samuel Norment, as to which this bill prays for a restoration of the title to complainant.

10. Complainant further prays for all such additional relief as to

this honorable court, the premises considered, may seem equitable and just.

(Signed) MAMIE E. NORMENT.

(Signed) SHELLABARGER & WILSON.
THOMAS P. WOODWARD.

I do solemnly swear that I have heard read the annexed bill, by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

(Signed) MAMIE E. NORMENT.

Sworn to before me this 28th day of April, 1892.

(Signed) WM. G. CLARY,
[NOTARIAL SEAL.] *Notary Public, D. C.*

248 The exhibits to this bill that are incorporated in this record are the will of George W. Uterhehle, the deed from Rose M. Taylor to Mamie E. Norment, the deed of Mamie E. Norment to Job Barnard, and Job Barnard, trustee, to Samuel Norment, and the three deeds mentioned as recorded on April 26, 1890, all of which have been heretofore set out in the record. All other exhibits are omitted.

Then *was* offered in evidence the answers of the several parties to the said bill, which said answers are as follows:

Filed July 30, 1892. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

MAMIE E. NORMENT, Complainant,
vs.
CLARENCE F. NORMENT ET AL., Defendants. } No. 13889. In Equity. Docket No. 33.

The joint and several answer of the defendants, James S. Edwards and Clarence F. Norment, as executors and trustees, and of the said Clarence F. Norment, Ulie N. Hurley, Ida Smith and her husband Odell S. Smith, in their own right, to the bill of complaint in the above-entitled cause.

Answering said bill, they say as follows:

1. They admit the averments contained in the first paragraph of said bill.

2. The averments contained in the second paragraph of the bill are also admitted to be true except that the ages of the minor defendants are incorrectly stated, the defendant, Ellie Norment, being 16 years of age, and the defendant, Harry Norment, being 13 years of age.

249 3. They also admit the averments contained in the third paragraph of the bill of complaint.

4. For answer to the fourth paragraph of the bill of complaint they say: They admit the execution and the delivery of the deeds of conveyance set out in the bill, of which the exhibits marked C, D, F and G, filed herewith, are copies, whereby the real estate described therein was transferred by the complainant to her husband, Samuel Norment, in fee-simple; that she also paid, transferred or delivered to him the several sums of money specified in the eighth paragraph of the bill of complaint, and that said real estate and other real estate of which the said sums of money were in part proceeds, were devised to the complainant by the will of her father set out in the bill. The said Clarence F. Norment and James S. Edwards, partly upon information and belief but principally of their own knowledge, and the other defendants joining in this answer, upon information and belief, say that the value of the said real estate described particularly in the deeds to Job Barnard, trustee, set out in the bill at or about the time mentioned in the bill, to wit, at the time of the execution and delivery of said deeds together with the said sums of money, was about $500,000, and that the value of the estate of the said Samuel Norment at the same time (exclusive of sundry stocks, bonds and other property of a speculative or uncertain value which he then held and owned) was about $750,000.

These defendants believe and therefore admit that at the time stated in said fourth paragraph said Samuel Norment knew approximately the value of the property he acquired by and through the said transfers and conveyances, and approximately the value of his own estate. These defendants, further answering, the said Clarence F. Norment of his own knowledge and the said Edwards and
250 the other defendants joining in this answer on information and belief, deny that at the time of such conveyances and transfers the complainant had but slight and imperfect knowledge of the value of the property which she so transferred and conveyed; that she was ignorant at that time, of the value of the property of her husband, the said Samuel Norment; that she was unacquainted with such matters or unskilled in business affairs, and that any such want of knowledge on her part existed at any time between the dates of any such transfers or conveyances, and the 19th day of February, 1892, as alleged, and that her said husband knew, or could have known of such ignorance on the part of the complainant; for the reason as already stated, that such ignorance on her part did not exist These defendants on information and belief deny that the said Samuel Norment at any time made any untrue statements or representations to the complainant as to the value, either of his own property or that which she transferred and conveyed to him as aforesaid; and on information and belief they deny that the complainant objected to such conveyances or transfers, or any of them, for the reasons stated in said fourth paragraph. These defendants, on information and belief deny that said Samuel Norment peremptorily demanded of the complainant that her said property, or any of it, should be conveyed, transferred or surrendered to him; that he stated to her that it was of small value compared with his own

estate; that he threatened that unless such transfer was made he would make a will cutting off complainant's children with $5; that by reason of such demand or threats, or for any other reason, the peace or well-being of the complainant or her household was seriously interfered with, or interfered with at all, and that the complainant conveyed or transferred said property, or any of it, to her husband in consequence of such threats, advice,
251 urging or demands as alleged by the complainant in said fourth paragraph. As to the complainant's averment that she made such conveyances and transfers to her said husband in consideration of his alleged promises and assurances that he would, by his last will and testament, devise and bequeath to her one-third of his entire estate in full and absolute ownership, these defendants on information and belief deny that he made any such promise or gave any such assurance, and that in making such conveyances or the transfers or payments of any of the alleged sums of money or of any portion thereof to her said husband, the complainant was influenced by or yielded to any misrepresentations, threats, demands, importunities or promises by her said husband, or that any such threats, demands, misrepresentations, importunities or promises were made by him. These defendants, on information and belief, deny that the conveyances to Job Barnard, trustee, of which the exhibits marked C and F filed with the bill of complaint are copies of either of them, or any of the transfers or payments of personal property or money by the complainant to her said husband, set out in the eighth paragraph to the bill of complaint, were or was made or submitted to by the complainant upon or for no other valuable consideration moving from her said husband to her than his alleged promises to convey unto her by his last will, in her full and absolute right, and ownership, one-third of the entire estate—including that so as aforesaid conveyed and transferred to him by her—of which her said husband might die possessed, and they deny that it was under the influence of any such alleged representations as to value or his alleged promises and assurances as to his will, or his alleged threats, that the complainant "at last yielded to said transfers and surrenders of her property," and they deny that but for such
252 alleged threats, representations as to value, promises or assurances, the complainant would not have conveyed or surrendered her property, and they aver that no such representations, promises, assurances or threats were made to the complainant by her said husband.

Further answering the fourth paragraph, these defendants on information and belief aver that the different sums of money paid to her husband, as alleged in the eighth paragraph, and the conveyances of real estate executed by the complainant to Job Barnard in trust to convey to her husband, whereof "Exhibits C and F" are copies, were so paid or caused to be paid, and the said conveyances were executed freely and voluntarily and with the intent and purpose on her part to vest in her husband the absolute ownership of the said moneys and real estate without any condition, limitation,

contract or trust in respect to the same, but subject to his plenary control and disposition, and that by means of the said payments and *and* conveyances by the complainant her husband became invested with such absolute ownership as aforesaid; that with the full knowledge and approval of the complainant he held, used and treated the said moneys and real estate as his own absolutely and devised and disposed of the same as his own by his last will and testament; that the consideration for the said payments and conveyances were love and affection, as well as other good and sufficient considerations moving the complainant; that the complainant and her husband intermarried on the 16th day of September, 1873, that their relations during their entire married life were affectionate and devoted, and she had entire confidence in his integrity and rare ability and skill as a business man, which confidence he fully merited; and after she became entitled, by the death of her father, to a large estate as one of his devisees, she
253 was willing and indeed desirous to invest her husband with the absolute ownership thereof subject exclusively to his judgment and control in the same manner as his own estate. That whilst he concurred in the propriety of such disposition, he left her free to exercise her own discretion and judgment, and that she was entirely capable of such exercise being intelligent, educate-, of uncommon capacity and skill in business matters and possessed of strong will, and that, except as above stated, the allegations of the bill as to the complainant being advised and repeatedly urged by her husband to transfer to him all her property devised by the will of her father, are without foundation; that after such disposition had been made he conferred with her as to the provisions which he should make as well to her as his children by his last will and testament, that he had in all five children of whom she was the mother of two, and it was their mutual desire that all the children should share equally the benefit of the whole estate as well the portion accumulated by his own labors as the other portion derived from her, and that the respective interests of the said children should be protected so far as might be against the chances of the future; that before his death and before and after the execution of his last will and testament she well knew and understood the provisions of the same, and especially those made in her behalf and for the benefit of the different children and approved the same, and that the pretensions now set up after the death of her husband, if allowed, will destroy the provisions thus approved in favor of the said children, including the two children of the complainant, and would introduce, in lieu of the equality in respect to the whole estate intended by the testator and approved by complainant, the grossest inequality; that the complainant after the death of her
254 husband, well knowing the provisions of the said last will and testament, and well knowing the condition of her husband's estate in respect to the values of property devised and otherwise, and having amply opportunity to renounce the same, if

any valid reason, made no such renunciation, but on the contrary elected to take under the said will and knowingly permitted the administration thereof to proceed, and, as hereinafter more fully set forth, has received the benefit of the said provisions from time to time in her own behalf and as trustee for her children, and that by reason of the premises the complainant, if she ever had any claim in derogation of the said provisions which is denied, is equitably estopped from the assertion of said claim. These defendants, on information and belief, deny each and every statement contained in and alleged by the said fourth paragraph of the bill of complaint not hereinbefore expressly admitted.

5. These defendants admit the averments contained in the fifth paragraph of the bill to be true as stated, except that lot 57 in square 511 was erroneously inserted in the deeds of which Exhibits C and D with the bill are copies. They further say that soon after the death of the said George W. Utermehle, the complainant and her sister, Rose M. Taylor, (wife of Leroy M. Taylor) made an equal division of the property acquired by them under his said will and for the purpose of vesting in each in severalty the respective properties as agreed and allotted in said partition mutual conveyances or deeds from the one to the other (in which their respective husbands joined and were parties,) were simultaneously executed, acknowledged and delivered, the deed to the complainant being set out in said fifth paragraph and of which the exhibit with the bill marked "B" is a copy. Both of these deeds were recorded at the same time in the Liber No. 1412 at folios 116 *et seq.* and 125 *et seq.* of the land records of said District.

255 6. These defendants admit the execution and delivery of the deed by the complainant conveying to said Job Barnard in trust as expressed in said deed, the property mentioned and described therein, and undiv-ed one-half of which for the purposes mentioned in the last preceding paragraph of this answer, they also admit, was conveyed, as hereinabove stated, to the complainant by her sister, the said Rose M. Taylor, and her husband, the said Leroy M. Taylor.

They also admit, that the said Barnard, in execution and in pursuance of the said trust and as required and directed thereby, conveyed all of the same property to the husband of the complainant, by the deed mentioned in the said sixth paragraph of the bill, and that said three deeds, of which the said exhibits, marked B and C, and the exhibit marked D, filed with the bill, are copies, were filed and recorded, as stated in the land records of said District.

7. These defendants admit the averments contained in the seventh paragraph of the bill.

8. These defendants believe and admit that the averments contained in the eighth paragraph of the bill, as to the sales of certain property held in common by the complainant and her said sister, acquired by them as aforesaid, and which was not allotted and partitioned *in specia* as to the division of the proceeds of such sales, and as to the payments or transfers of the moneys therein mentioned,

at or about the times and in the manner stated, are true, but upon information and belief these defendants again deny the averments in said eighth paragraph as to the assurances, demands, threats, influences, promises and means by which the complainant alleges she was induced to make the payments or transfers of the
256 sums of money set out in detail in said paragraph, and they deny that the complainant, as she alleges herein, never received from her said husband any consideration whatever for said moneys except the alleged promise to make and leave a last will as described and in the manner set forth by the complainant in her bill.

9. These defendants admit that said Samuel Norment purchased the property known as 928 M street, N. W., and more fully described in the bill of complaint as averred in the ninth paragraph thereof, and that only $5,000 of the purchase-money was paid in cash, and that the remainder of the purchase-money was represented by his promissory note in the sum of $16,500. These defendants also admit that the complainant united with her said husband in conveying said premises to said Benjamin P. Snyder and A. L. Sturtevant in trust to secure the payment of said note. Upon information and belief these defendants further admit that said note was purchased by complainant's father, George W. Utermehle, and that under his said will it passed to his widow, Sarah Utermehle, the complainant's mother. These defendants, on information and belief, admit that at or about the time of the purchase of said last-described property, and afterwards, the said husband of the complainant occasionally spoke of said property as "Mamie's house." But these defendants have no knowledge as to whether the complainant's said husband at or about the time of said purchase stated that he had purchased it for his wife, the complainant, or as to whether by speaking of the same as "Mamie's house" he led any person to believe that said property was the property of the complainant, but upon information and belief they deny the same.

On information and belief these defendants deny that after said Sarah Utermehle had acquired the ownership of said
257 note, the husband of the complainant represented to her that it represented the purchase-money for said property and deny that he assured said Sarah that said lot and appurtenances would be the property of his wife, and deny that he repeatedly made to complainant the same assurance or that he — it to her at all, and deny that said Sarah knew nothing to the contrary, and deny that she, believing said alleged statements to be true, was thereby induced to present to the complainant the said note for the purpose of enabling her, through the surrender thereof, to pay the amount thereof upon or for the said last-named lot and appurtenances, and they deny that complainant surrendered said note to her husband in payment upon and for said last-mentioned lot on the faith of the promises and assurances alleged to have been made by complainant's said husband to her or her mother that said lot should be the property of complainant. Upon information and belief these defendants aver

that Sarah made an absolute and unconditional gift of said note to the complainant, and that the complainant transferred it to her said husband in the same way, or voluntarily cancelled it, or caused it to be cancelled. They admit a release of said deed of trust to Benjamin P. Snyder and A. L. Sturtevant was obtained by the husband of the complainant, and that Exhibit K to the bill of complaint is a copy of said release.

These defendants, on information and belief, deny that said Sarah Utermehle presented the complainant the sum *the sum* of $5,000 and directed the complainant to give the same to her husband and to request that the conveyance of said premises be made to the complainant, and deny that the complainant, in pursuance of said alleged direction and wishing to have the title of the property
258 in her own name, did in May, 1889, or at any other time, tender to her said husband said sum of money, stating to him that it made, with said note for $16,500 the full amount of the purchase-money of the property, and requesting that the same be conveyed to her; and deny that the complainant's said husband declined or ever had an opportunity to decline such a request or became enraged, and that he declined to receive the money alleged to have been tendered to him on the ground that he would never live in a house that was in his wife's name. And on information and belief these defendant- aver that when complainant's said husband died, said house and premises on M street were his absolute property and were not charged with any trust or equity whatever in favor of the complainant.

10. They admit that said Samuel Norment died on the 23rd day of March, 1891, seized of a large estate, including all of the real estate conveyed to him by the complainant through said Barnard, trustee, as aforesaid, and that said part of lot 12 in square 369, and that the said several sums of money paid to said Samuel Norment as set forth in the eighth paragraph of the bill, had, prior to his death, become intermingled with his other money and used and disposed of in common with them. These defendants admit that when Samuel Norment died he left the complainant, his widow, and the defendants, Clarence F. Norment, Ulie N. Hurley, and Ida Smith, his children by a former wife, and the defendants, Ellie Norment and Harry Norment, his children by the complainant, as his only heirs-at-law. And in this connection these defendants aver that the defendant, Ulie N. Hurley is 45 years of age and has no issue living; that the defendant, Ida Smith (who is 28 years of age) and her husband, the defendant, Odell S. Smith, have two children, one of said children being a son, Frank S. Smith, born October 16, 1888, and the other a daughter, Ida Smith, born July 9, 1890.

259 11. They admit the arguments of the eleventh paragraph of the bill of complaint.

12. These defendants of their own knowledge and on information and belief deny that the complainant did not comprehend the terms of the purport of the will of her said husband; that she believed after his death that he had by said will provided for her an interest

in his estate equal to one-third of his entire estate; that her said husband made the representations, agreements and promises referred to in the 12 paragraph of the bill, or any of them; that during the time from the death of complainant's said husband until the month of February, 1892, the complainant remained in ignorance of the character of his said will; that she did not, during that period, apprehend the effect of said will; that she had not received any advice from any person whomsoever in regard to her rights under said will; that she was incapable of exercising any judgment intelligently in regard to her said rights; that she was incapable, owing to her alleged ignorance or for any reason, of taking intelligent action touching her rights under said will; and that her failure to renounce the provisions made for her in said will within the time prescribed by law was the result of either ignorance or affliction. On the contrary these defendants, on information and belief, aver that the complainant was well acquainted with the provisions of said will at or about the time of its execution and of their own knowledge they aver that she was thoroughly acquainted with the contents of said will long before February 19, 1892. As to whether the complainant during the alleged period took the advice of counsel as to her rights under the said will, these defendants have no knowledge or information or belief, but they aver that during the whole of said period she fully understood her said rights.

Further answering said 12th paragraph these defendants
260 say that they are advised and therefore aver and claim that by reason of the failure of the complainant within the time prescribed by law to deliver or transmit to the court where the authentication or probate of her said husband's will had been made a written renunciation in the form and manner required by law, the complainant is and at the time of the filing of her bill herein, was conclusively barred of her right of dower in the lands and real estate and her share in the personal property (as in case of intestacy) of which her husband died seized and possessed.

13. These defendants of their own knowledge and on information and belief deny that in so far as the complainant has received any moneys from the executors under said will or done any act tending to recognize the provisions of said will, she did the same under the operation either of mistake or of ignorance or of affliction or of incompeteney.

14. These defendants admit that between the 23rd day of March, 1891, the time of her husband's death, and February 19, 1892, the complainant from time to time received from the trustees under said will furniture and other personal property bequeathed to her by said will amounting in money and in specie, according to appraisement and valuation provided for in the will, to the sum of $57,985.33, and that these defendants, the said trustees, hold her receipts for the same. They further say that said sum is made up of the following items paid and transferred as directed in the first paragraph in the will of her husband to the complainant on or about the dates stated, viz:

1891.
July 1. The specific bequest in full of the furniture and other household effects contained in his family residence and articles of jewelry appraised at the sum of..... $2,330.50

1891.
Oct. 7. The money or pecuniary legacy in full of..... 5,000

261 On account of her one-third absolute interest in the rest and residue of said testator's personal property, to wit:

1891.
July 2. In bonds, stocks and other interest-bearing real-estate securities appraised at the sum of..... $43,879.70

1891.
Dec. 23. In cash..... 4,858.33
Dec. 29. In cash..... 1,015.50

1892.
Feb. 4. In cash..... 901.34

In this behalf they further say that in the schedule and valuation of the personal property from which the bonds, stocks and securities mentioned in the above item were selected by the complainant under the provisions of said will, *was* included the charges contained therein against the defendant, Clarence F. Norment of $36,536.72 and his sister, the said Ulie N. Hurley of $15,000, making a total of $51,536.72, which charges are directed by their father in said will to be treated as debts due to his estate on the division thereof, and considered as part of his personal property, the complainant's share thereof received by her as aforesaid, being the sum of $17,178.91. These defendants deny—the said Clarence F. Norment on his personal knowledge and the said Edwards and the other defendants joining in said answer on information and belief—that the complainant, at the time of the filing of her bill of complaint herein, held said personal property in her possession in the form in which she received it, and aver that the complainant had from time to time used and disposed of portions thereof as belonging to her, and among other things, had sold and disposed of certain of the bonds or stocks thus received.

These defendants further aver that the said Clarence F. Norment and James S. Edwards as aforesaid, in the execution both of the trusts of the will of their said testator, have also paid to the
262 complainant, on her individual account, certain other sums of money from the net income of the real estate held by them as trustees, as aforesaid, amounting in the aggregate to the sum of $13,300. That said income was paid to the complainant in about equal monthly payments from and beginning with the tenth day of April, 1891, and including and ending with the 5th day of March, 1892, which with the personal property she admits in the said 14 paragraph to have received from them makes the sum of $71,285.33 that the complainant received prior to the filing of her bill of complaint

herein. On the 5th day of April, 1892, said trustees under said will also tendered the further sum of $1,500 to the complainant on her individual account from said net income of said real estate, and on the 14th day of the same month they also tendered her on her individual account from said personal property the additional sum of $666.67, the receipt of which sums, however, under the advice of counsel, was declined. They further say that contemporaneous with such payments and tender to the complainant for said income said trustees paid from the same source up to and including the said 5th day of April, 1892, certain other sums of money to complainant as trustee for her children, and to the said Clarence F. Norment and his sisters, the said Ulie N. Hurley and Ida Smith the further and additional sum of $33,000; that is to say, the sum of $6,600 to or for or on account of each of the five children of the testator.

At or about the time the said pecuniary legacy of the $5,000 was paid to the complainant as aforesaid, said trustees and executors also paid all of the other pecuniary or money legacies mentioned in her husband's said will except that to his brother, Richard B. Norment, which they were directed by this court, holding a special term for orphans' court business, to retain because he was indebted to the estate in a sum exceeding his legacy under the will; and these defendants aver that the principal portion of the trusts of said
263 will concerning the personal property have been executed by said trustees and executors.

On their own knowledge and on information and belief, these defendants deny that the complainant received from said trustees the personal property or any portion thereof or any of the sums of money hereinbefore alleged to have been paid to her, either in her own right or as trustee for her children, under the influence of ignorance, or incompetency, or affliction or mistake. To the contrary, they aver that the complainant received the same and every part thereof, with full and absolute knowledge on her part of the contents and provisions of the said will of her said husband.

15. These defendants admit that on the 19th day of February, 1892, said trustees submitted to the complainant a schedule of the real estate of said Samuel Norment as provided for in his will, and they, at that time, requested her to select one-third of said real estate in accordance with the provisions of said will. Of their own knowledge they deny that upon the inspection of said schedule the complainant for the first time became acquainted with the provisions of the will of her said husband, or that at that time she first became acquainted with the alleged facts set forth in her bill as to how the provisions of said will failed to comply with the alleged representations, inducements and promises under the influence of which in part, complainant alleges her said husband secured the transfer to him of her real and personal estate as in her bill set forth. And on the contrary they aver, on information and belief, that the complainant was fully acquainted with the contents and provisions of said will at and before the time of its execution, and of their own knowledge they aver that she was fully acquainted with the contents and

provisions thereof long prior to the 19th day of February, 1892, when said schedule was submitted to her. These defendants,
264 upon information and belief, deny that the complainant's said husband grossly or otherwise deceived her at the time she conveyed her property to him as aforesaid, in regard either to its value or its extent, and deny that the complainant did or could have become aware for the first time of the fact of such alleged deception when said schedule of real estate was submitted to her as aforesaid, and of their own knowledge they again aver that the complainant was well informed of the contents of said will long prior to the time the said schedule was submitted to her, and on information and belief that she well knew the extent and value of the property conveyed and transferred by her to her husband at the time of said conveyance and transfer, and they deny that he made to her any false or fraudulent representations and promises concerning said transfers and conveyances to him whatever. And as to the concluding sentence of the 15th paragraph of the bill, these defendants, for the reasons hereinbefore set forth, deny each and every averment therein contained.

16. For the reasons already fully set forth, these defendants deny each and every averment of the 16th paragraph of the bill.

17. For the reasons already set forth these defendants deny each and every averment of the 17th paragraph of the bill.

18. For the commission allowed to the said Clarence F. Norment and James S. Edwards, as trustees, these defendants refer to the provisions of the said will and they deny that the commissions allowed thereby are excessive or unjust, and further that this court has the power to change the provisions of the said will as to said commissions. They further deny the said Clarence F. Norment and the said James S. Edwards, on their own knowledge, and the other defendants joining in this answer, on information and belief, that when the bill was filed said trustees were about to sell por-
265 tions of the estate of the testator for the purpose of paying the said commission or any fee due to or claimed by them, or alleged, or that any such sale, if intended, would have been unjust or could have been injurious to the residue of the estate, as pretended.

And having fully answered, these defendants pray to be hence dismissed with their reasonable costs in this behalf most unjustly incurred.

CLARENCEF. NORME-T,
Executor and Trustee and in His Own Right.
JAMES S. EDWARD–,
Executor and Trustee.
ULIE N. HURLEY.
IDA SMITH.
ODELL S. SMITH.

DISTRICT OF COLUMBIA, *ss:*

We do solemnly swear that we have read the foregoing answer by us subscribed and know the contents thereof; that the facts therein

stated upon our personal knowledge are true, and those stated on information and belief we believe to be true.

CLARENCE F. NORMENT.
JAMES S. EDWARDS.
ULIE N. HURLEY.
IDA SMITH.
ODELL SMITH.

Subscribed and sworn to before me this 30th day of July, A. D., 1892.

T. S. HOPKINS,
Notary Public.

[SEAL.]

W. D. DAVIDGE,
A. S. WORTHINGTON,
Solicitors for Defendants.

266 In the Supreme Court of the District of Columbia.

MAMIE E. NORMENT, Complainant,
vs.
CLARENCE F. NORMENT ET AL., Defendants. } Equity. No. 13889.

Separate Answer of Benjamin F. Hurley.

To the honorable, the judge of the supreme court of the District of Columbia, holding a court of equity, the answer of Benjamin F. M. Hurley, one of the above-named defendants, respectfully shows:

1. That he admits the first and second paragraphs in the complainant's bill to be true as therein stated.

2. That he neither admits nor denies the allegations set forth in the third, fourth, fifth, sixth, seventh, eighth and ninth paragraphs of complainant's bill to be true or wrongfully stated because he says that he is an utter stranger to all and every the matters in question.

3. That he admits *that* the tenth and eleventh paragraphs mentioned in said bill to be true.

4. That this defendant further *in* answering says that he neither admits nor denies the paragraphs twelve, thirteen, fourteen, fifteen and seventeen are true or wrongfully stated in said bill of complaint because he says he has no knowledge concerning the matters or things stated therein.

267 5. That the allegations set forth in the eighteenth paragraph of said bill wherein complainant charges that the trustees and executors charged the estate with 10% on the corpus, and also on the income of said estate as being excessive and unjust, *is* true, but this defendant further says that he has no knowledge that the said trustees and executors are about to proceed to sell portions of the deceased estate of Samuel Norment for the purpose of paying their said fees, and he says further that it may be true for

anything he knows to the contrary. And this defendant further answering says that any other matter or thing material or necessary for him to make answer unto and not herein or hereby well and sufficiently answered unto, passed or avoided, traversed or denied, is true to the best of his knowledge, information and belief, and he honorably prays to be hence dismissed with costs as in duty bound, etc.

BENJAMIN F. HURLEY,
One of the Defendants.

(Answer under oath being expressly waived in said bill of complaint.)

268 Then was offered in evidence the agreement entered into by the parties to said cause, which said agreement reads as follows:

Filed Feb. 23, 1895. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

MAMIE E. NORMENT, Complainant,
vs.
CLARENCE F. NORMENT ET AL., Defendants.
} No. 13889, Equity Docket 33.

In settlement and compromise of all the matters involved in the above-entitled cause, it is by the adult parties hereof this 18th day of February, A. D. 1895, stipulated and agreed as follows:

1. That complainant, Mamie E. Norment, shall have and hold in her own absolute right, in fee-simple, the real estate and premises described in the ninth paragraph of the bill of complaint exhibited herein, to wit, all of that certain lot or parcel of ground and appurtenances and hereditaments thereto belonging, situate and lying in the city of Washington, District of Columbia, known as and being all of lot No. 12 in square No. 369, except the west 5 feet from front to rear thereof, condemned for alley purposes, subject, however, to the payment by the said Mamie E. Norment to the executor of the estate of her husband, Samuel Norment, of the sum of $5,000, which sum, until paid with interest from the date of this stipulation to the time of its payment, is hereby declared to be a lien and charge on the said lot and premises and appurtenances in favor of said executors, and upon the payment of said sum and interest thereon

269 as stated, to the said executors, the defendants, the general trustees in the will of the said Samuel Norment shall forthwith convey said lot and premises and appurtenances to the said Mamie E. Norment, her heirs and assigns, free, clear and discharged of the claims interests and demands of all of the other parties to this suit, and of those claiming through or under them or any of them.

2. Excluding from his real estate the said part of said lot 12 in said square 369 and appurtenances and hereditaments thereof belonging, the said complainant, Mamie E. Norment, shall also be entitled to have and receive in full and absolute owership in her own right one-third of the entire estate, real and personal, of which her husband died seized and possessed, after the payment of all his debts and funeral expenses and costs of the probate of his will, and the administration of his estate and the charges and expenses connected therewith and incident thereto, not, however, including in such costs and expenses as against said complainant the compensation retained and to be retained by the general trustees named in said will for their services in executing the general trusts thereof concerning the principal of such estate, except as hereinafter contributed by the complainant for that purpose by deducting from her share of the income from the real estate in the hands of said trustees as hereinafter provided. The said complainant shall also be entitled to have and receive in her own absolute right one-third of the net rents, income and revenue from such estate since the death of her said husband, less the sum of $7,500 which is to be applied towards the compensation of the said trustees in respect to said principal as provided in said will, the said trustees hereby consenting to a reduction of the sum of $12,500 from their said compensation and which sum in the aggregate amounts to or equals the commission provided in the will on the estimated value of the
270 *of the* increased principle of the estate of the said testator acquired by the complainant through this stipulation. Provided, however, that the specific bequest to the complainant of the household furniture effects, etc., and the money legacy to her mentioned in the first paragraph of said will, and all of the other moneys, securities and personal property received by the said complainant from the said executors and trustees before the commencement of this suit, shall be treated and considered and are hereby held to be payments to the complainant at the valuation fixed and for the amounts represented by her receipts therefore on account of the shares of the part of the property of her husband's estate which she is entitled to have and receive under the provisions of this stipulation, the items of such personal property, moneys and securities with the dates of payment and delivery being particularly set out and described in the fourteenth paragraph of the answer of the defendants to the bill, and amounting in the aggregate to the sum of $75,985.37, and any and all payments from the rents or income, made by said executors and trustees to the complainant since the death of her husband, shall be treated and considered as and are hereby held to be payments as on the dates made on account of the portion of the net rents, income and revenues from the estate of her husband, which the complainant is to receive as aforesaid.

3. That, save as to the said part of said lot 12 in square 367 which is included, the inventory and appraisal of the real estate belonging to the said Samuel Norment made by Clarence F. Norment and James S. Edwards as trustees under said will, a copy of which was delivered to the complainant as provided by said will, prior to the

commencement of this suit and filed as Exhibit One with the complainant's testimony in this cause, shall stand and be in full
271 force for the purpose of the division of the estate and in ascertaining and determining the rights of all the parties interested in the provisions of said will and this stipulation. The complainant shall have the right to select the real estate she is to receive under this stipulation from all of the real estate conveyed by her to her said husband and derived by her from her father at the appraised value of the respective pieces or parcels so by her selected as set forth in said Exhibit No. 1, said selection to be completed within 60 days from the date of the final decree in said cause, to be entered in pursuance of this stipulation.

4. Said principal trustee under said will shall include in the shares which the defendants, Ellie Norment and Harry Norment are entitled to receive from said trustees in equal shares, as near as practicable, the remainder of the real estate so conveyed by said Mamie E. Norment to said Samuel Norment, or so much thereof as may be required to make up their repective shares.

5. The complainant and defendants shall pay her and their respective costs incurred in this suit, and all relief prayed for in the bill of complaint and not provided for by this stipulation, shall be denied.

6. This cause to be submitted to the supreme court of the District of Columbia holding a special term in equity upon the pleadings and the evidence already taken, and this stipulation, and if the court, upon the pleadings and the evidence shall, as to said infant defendants, Ellie Norment and Harry Norment, determine that the making of a decree in compliance in all respects with this stipulation shall be just and equitable to them, and shall make such a decree, then all the parties hereto shall be bound by this stipulation and by
272 such decree as a final determination of all the controversies involved in this suit. But if the court shall decline to make such a decree as against such infant defendants or either of them, then this stipulation shall not be filed in the case and no use of the same shall be made by any party hereto against any other party or parties, and the cause shall proceed as though it had never been signed.

SHELLABARGER & WILSON,
JAMES P. WOODWARD,
Attorneys for Mamie E. Norment.
MAMIE E. NORMENT.
W. D. DAVIDGE,
A. S. WORTHINGTON,
Solicitors for the Executors and Trustees and Others for Whom They Appear of Record.
JAMES S. EDWARDS,
Executor & Trustee.
CLARENCE F. NORMENT,
In My Own Right and as Executor and Trustee.
ULIE N. HURLEY AND
IDA NORMENT SMITH.

Then was followed in evidence the decree in said cause which reads as follows:

In the Supreme Court of the District of Columbia.

MAMIE E. NORMENT, Complainant,
vs.
CLARENCE F. NORMENT ET AL., Defendants.
No. 13889.
Equity Docket 33,

(Filed Feb. 23, 1895.)

This cause, coming on for hearing upon the pleadings and
273 testimony and the stipulation of the adult parties in interest and the respective solicitors and attorneys, filed herein, which stipulation is in the words and figures following, to wit: (Then appears the stipulation which is at length and in full set forth herein.)

And the court having duly considered the same, and it appearing to the court upon the pleadings and the evidence that the making of a decree in compliance in all respects with the terms of said stipulation will be just and equitable to the infant defendants, Ellie Norment and Harry Norment, and to all concerned, it is therefore this 23rd day of February, A. D. 1895, adjudged, ordered and decreed that the terms of the said stipulation be and the same are hereby approved and made binding on all of the parties to this cause. And upon consideration of the pleadings and evidence in the cause it is further adjudged, ordered and decreed that the complainant, Mamie E. Norment, shall have and hold in her own absolute right, in fee-simple, the real estate and premises described in the ninth paragraph of the bill of complaint exhibited herein, to wit, all of that certain lot or parcel of ground and appurtenances and hereditaments thereto belonging, situate and lying in the city of Washington, District of Columbia, known and being all of lot No. 12 in square No. 369, except the west 5 fe-t from front to rear thereof, condemned for alley purposes, subject, however, to the payment by the said Mamie E. Norment herein, within sixty days from the date of this decree, the full sum of $5,000 with interest thereon as in said stipulation provided, which sum and interest are hereby declared to be a lien and charged on the said lot and premises and appurtenances in favor of said executors; upon a payment of said sum and interest thereon as stated, to the said executors, the defendants, James S. Edwards and Clarence
274 F. Norment, the joint trustees under the will of said Samuel Norment, shall forthwith convey the said land, appurtenances and premises to the said Mamie E. Norment, her heirs and assigns, free, clear and discharged of the claim, interests and demands of all of the other parties to this suit, and of those claiming through or under them or any of them, subject to the terms and provisions of said stipulation, and after the payment of all of his

debts and funeral expenses, the costs of the probate of his will, and of the administration of his estate, and of charges and expenses therewith and incident thereto, and excluding therefrom said part of said lot 12 in square 369, the appurtenances and hereditaments thereto belonging, the said complainant, Mamie E. Norment, shall *shall* also be entitled to have and receive in full and absolute ownership in her own right, one-third of the entire estate, real and personal, of which her husband died seized and possessed, and also one-third of the net rents, *income and revenue from such estate* since the death of her said husband; that the complainant shall have the right of selection as provided for in said stipulation, and that upon their being notified in writing of her selection of the real estate, she is to receive under this decree and the said stipulation, within the time provided therein, the said trustees shall convey on her full power to do so within such time they shall select and convey such share of said real estate to the said complainant, her heirs and assigns, free, clear and discharged of the claims, interests and demands of all of the other parties to this case, and of those claiming through or under any of them. That the said complainant and the said defendants to this suit shall pay their own costs respectively, and all relief prayed in the bill of complaint herein and not granted by this decree be and the same is hereby denied.

W. S. COX, *Justice.*

275 Thereupon it was further agreed by counsel that Mrs. Rose M. Taylor, in the month of May, 1900, was seized of all the real estate which she derived under her father's will, except certain parcels which had been sold for the purpose of partition, and other pieces not so sold, which latter were of the value of $40,000.

It is further stipulated that the said Mamie E. Norment was seized in the year 1900 of real estate derived by her under the will of her father, George W. Utermehle, of the value of not less than $100,000.

It is further admitted that no other will of George W. Utermehle than that offered in evidence in this case has ever been filed in the office of the register of wills of the District of Columbia.

And, thereupon, THOMAS P. WOODWARD was duly sworn as a witness on behalf of the caveator, and he testified that he was a member of the bar and was one of the attorneys in the case; that he has not in his possession any will of George W. Utermehle and that he has no knowledge of any other will of George W. Utermehle than that which was offered for probate here, and that he has acted as the attorney for the caveatees in this case since the month of May, 1900 and acting as their attorney in the case of Norment *vs.* Norment, and afterwards in the matter of the estate of Sarah Utermehle. He became the attorney in Norment *vs.* Norment when the case was filed which was in April, 1892; that he was a witness to the will of Sarah Utermehle.

Thereupon HARRY NORMENT, who had been duly sworn, resumed the stand and testified as follows: That he is one of the grandsons of George W. Utermehle and that he had no knowledge of any other will of George W. Utermehle than the one which has been read in evidence in this case, that he has a sister of the whole
276 blood. On cross-examination witness testified that when he said he had no knowledge he meant no personal knowledge, and, thereupon, he was asked:

Q. Have you ever heard of any other will of George W. Utermehle than the one which has been read in evidence in this case, the one dated December 7, 1887? A. I never did, except what mention you made of a previous will in court.

Being further questioned by Mr. Worthington, he stated that he heard Mr. Perry speak in his opening statement about a will of 1859, and also his statement in regard to the contents of the same about his giving the estate to his son who was then living, in trust for himself and his three sisters who were then living, but with that exception he never heard of any other will.

Thereupon ELLIE NORMENT BOOZ was duly sworn, on behalf of the caveator, and testified that she was a daughter of Mrs. Norment and a granddaughter of George W. Utermehle. Thereupon she was asked the following questions:

Q. Mrs. Booz, to your knowledge, do you know of any other will of the late George W. Utermehle than the will here in question? A. I do not.

Q. Do you remember when George W. Utermehle died? A. I have a faint recollection.

Q. Did you ever hear of any will of the late George W. Utermehle other than the will here in question? A. I answered before that I hadn't heard of any. You asked me before if I had heard of any will.

Q. No, the first question was whether to your knowledge there was any other will. Now, I ask you if you ever heard of any other will than the will in this case. A. I know of no other will.

Q. I will ask you if you ever heard of any other will. A. I never heard of any other will.

277 And next thereupon counsel for caveator addressed the trial justice as follows:

Mr. PERRY: Now, if your honor, please I offer testimony by the mouth of Seth A. Terry, a competent witness, who has been duly sworn, relating to the mental condition of the alleged testator, George W. Utermehle, prior to the making of his will in December, 1887. I further offer to prove by the testimony of the said witness that shortly prior to December, 1887, the said George W. Utermehle was of unsound mind, and not capable of executing a valid deed or contract.

Mr. WORTHINGTON: I object to that evidence on the ground that

the testimony already offered on behalf of the caveator, and especially his own testimony, and the written documentary evidence that has been filed, show that he is estopped from contesting this will on the ground of mental incapacity or any other ground. I wish to inquire of counsel for the caveator whether they have any other evidence to offer on the issue of estoppel.

Mr. PERRY: Before answering this question, and in order to raise the point with respect to both issues, the caveator further offers to prove by the testimony of Eugene C. Hannan, a witness of lawful age, duly sworn and upon the stand, that the witness had opportunities of observing the said deceased, George W. Utermehle, when in the company of his daughter, Rose M. Taylor, and her husband, Dr. Leroy M. Taylor, and that in the opinion of the witness the testator was unduly influenced by the said Rose M. Taylor and Leroy M. Taylor in the making of his alleged will.

It is proper to say to the court that the testimony offered with respect to both these witnesses, is, of course, simply the first step.

278 We have a number of witnesses whom we propose to examine under both of these heads, and also witnesses that we propose to examine with respect to the issue of fraud and duress. We cannot offer them all at the same time.

The COURT: I understand that.

Mr. PERRY: The point, as I understand, here, is that the court desires to know from us, in answer to the suggestion from Mr. Worthington, whether or not we have any further evidence that we propose to offer under the head of estoppel or tender. In answer to that question we say that we have not; but we desire to proceed with our case upon the other issues.

The COURT: Then, gentlemen, if all the testimony that the caveator has to offer on the subject of estoppel has now been introduced, it seems to me that it would be proper and a right thing for the court to hear your argument on the subject of estoppel, with a view, if it should be determined that there is an estoppel in the case, or that you have not overcome the facts that would probably amount to an estoppel unless there were some excuse for them (and the burden to overcome *to overcome* those facts would be upon the caveator, of course) that the case might be ended upon that issue. Of course, if there is an estoppel there is no need of taking up the time of the court and of the parties by going into the other questions under the will. Therefore I think it very proper that you gentlemen should present that matter now to the court; and, of course, if it results in a decision that there is no estoppel we must go on with the case. If it should result the other way, probably the case would be suspended at this point, and then you could raise that question on appeal.

Mr. PERRY: Your honor will understand that we are contending here that without reference to this doctrine of estoppel the court is bound to submit each one of these issues to the jury.

279 The COURT: Yes I understand.

Mr. PERRY: And to hear our testimony in support of each one of these issues.

The COURT: I understand that.

Mr. PERRY: We have here a number of witnesses in support of each one of these issues whom we desire to examine, entirely independently of this question of estoppel and tender; and we are ready to proceed with them.

Mr. WORTHINGTON: It seems to me, your honor, that we ought to discuss the question which is preliminary to the preliminary question first. What is the use of our spending a day or two here discussing this question of estoppel, if your honor is to be afterwards asked to submit the other evidence and issues to the jury without regard to your views on the subject of estoppel?

Mr. PERRY: We do not intend to argue them at all. I am simply saving our rights on the record, Mr. Worthington.

The COURT: If my view should be that there was an estoppel, I would then think it was the duty of the court to say to the jury that they should return a verdict in favor of the caveatees under all the issues.

Mr. PERRY: Your honor does not wish to hear from us on that point?

The COURT: No. Of course if the court should take that view there would be no ground for setting aside the will on any of the other issues, because this caveator, being the only caveator, would be in such a position that he could not produce any evidence of that kind properly to the court.

Mr. PERRY: Of course your honor gives us an exception on that point?

The COURT: Yes.

280 Mr. PERRY: We reserve an exception on each of those points.

Mr. WORTHINGTON: Now, your honor, I object to this offer of testimony as to mental capacity and as to undue influence. So far as the offer is made as to undue influence, I object to that also on the ground that it is utterly incompetent and immaterial, without regard to the issue of estoppel.

The COURT: I understand you now, on this issue, to ask for an instruction from the court that at this time the court shall instruct the jury that there is an estoppel?

Mr. WORTHINGTON: That would be the next step. Of course if your honor sustains my objection to this evidence on the ground that his mouth is shut to offer it, I shall then ask your honor to instruct the jury to render a verdict on all the issues in favor of the caveatees.

The COURT: I sustain your objection at the present time to offering any further testimony. You understand that I sustain that objection, so that we are now confined to the issue of estoppel.

Mr. PERRY: And to that ruling we except.

Mr. WORTHINGTON: Then I move your honor to instruct the jury to render a verdict for the caveatees; and in order that I may have my case properly upon the record, let it be understood that that motion is made separately as to the first issue, separately as to the

second, and then in gross as to the rest. The first issue is as to whether the caveator is estopped as to the will of personal property; the second as to the will of real estate. Then the third motion would involve all the other issues. I make those three motions.

And thereupon counsel for the caveator objected to the
281 court granting said motions ard argument was heard upon the same and the court thereafter delivered his opinion, which is as follows:

In this case certain petitions and pleadings were filed in the office of the register of wills, on which the court framed certain issues concerning the will of George W. Utermehle, to be tried by jury.

These issues are six in number, and the court has been engaged for some days in the trial of the same, and until it was thought by counsel and by the court to be expedient to consider at this time some questions of law that seemed to present themselves now on the evidence thus far offered. After hearing the able arguments of counsel for the respective parties, and consideration of the numerous authorities cited, I will announce my conclusion.

The first issue is this: "Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property?"

The second is in like words, except the date as to the estoppel is September 27, 1900, and refers to said paper-writing as a will of real estate.

The other four issues raise questions as to the testamentary capacity of the said testator, undue influence over him by the caveatees, and fraud, duress or coercion in the procurement by them of the execution of said paper-writing. All of plaintiff's evidence as to the issues of estoppel having been received and counsel for the defendants, the caveatees, claiming that the same is not
282 sufficient to give the plaintiff a standing in court as a contestant of said will, moves the court to direct the jury to return a verdict in favor of the caveatees on all the said issues.

The question thus raised is one in the nature of a demurrer to the evidence relating to the issues of estoppel, and is made on the theory that if the evidence as such is insufficient to support a verdict against the caveatees on these issues, and they must be answered in the affirmative, then there is no party in court who can be heard to contest the said will, and the said issues relating to its validity must also be answered in favor of the caveatees. George W. Utermehle was a man well known in this District, having resided in this city for a great many years, and having accumulated a large estate, consisting of improved real estate and of personal property. He had three children who reached their majority, one son and two daughters. The son was given a liberal education and became a lawyer by profession and a member of the bar of this court. He married in 1861 and his wife bore him a son, in 1865; and in 1867 he died, leaving his widow and infant son surviving.

Soon after his death there was litigation between said George W. Utermegle and his daughter-in-law, and growing out of that, or for some other cause, their relations became strained, so that she never spoke to him after April, 1867. The grandson, the present plaintiff, lived with his mother in this city, and the evidence tends to prove that when he was old enough to visit his grandparents, his mother was in the habit of sending him to their home frequently by some one; and after he was of sufficient age to go alone, he frequently visited his grandparents, staying over night; and his personal relations with his grandfather would seem to have been friendly.

283 In 1882 or 1883 the plaintiff went to live at Frederick, Maryland, after which his visits were less frequent at his grandfather's house. In 1884 he was married, and continued to live in or near Frederick until early in 1887, when he was again in this city for several months, engaged in the real-estate business. He then returned to Frederick, and was engaged in business there as a farmer, horse-dealer and manager and proprietor of a hotel up to about November, 1899, when he again returned to this city, where he has since resided. While living in Frederick, he made frequent visits to this city where his mother continued her residence. Said George W. Utermehle made his will on December 7, 1887, by which he bequeathed to three nieces in Germany three thousand dollars each. He gave to his said grandson real and personal property aggregating in value about $22,000. He gave all the residue of his personal property to his widow, and all the residue of his real estate to his two daughters, to be equally divided between them, the value of the said real estate being about $1,000,000. He died April 16, 1889.

April 26, 1889, his widow filed her petition in the office of the register of wills of this District, as sole executrix of her husband's will; and thereupon all the next of kin signed a writing and filed it in the cause wherein they waived citation, and the will was admitted to probate as a will of personal property and letters testamentary were issued to the said executrix, she giving a special bond in the penalty of $20,000.

May 9, 1889, the plaintiff herein received from the said executrix, his grandmother, $2,116.88 in full for note of $750 and interest which was left to him in the will of said George W. Utermehle.

284 The legacies to the nieces of said testator in Germany were also paid to them by said executrix some time thereafter; and on May 14, 1890, she filed a sworn statement in this cause showing such payments and filing the receipts, and stating also that she had paid all the debts of said decedent.

Thereafter, March 13, 1893, Mrs. Sarah Utermehle died, she having made her will, July 5, 1889, by which she gave all her estate to her two daughters and said grandson, to be equally divided among them, and appointed her two daughters executrices.

March 17, 1893, the said executrices filed a petition for probate of said will and grant of letters to them; and on the same day all the next of kin signed a paper and filed it in the cause, waiving citation.

The signature of said C. H. Utermehle to said waiver is witnessed by Eugene Carusi, Esq., a prominent member of this bar.

Thereupon said will was duly admitted to probate, and letters granted, on giving a general bond in the penalty of $5,000.

On March 20, 1893, the said executrices filed in the cause an agreement under seal wherein they agreed to charge or receive no commissions, in consideration of said Charles H. Utermehle waiving all notice and consenting to the probate of said will.

July 6, 1894, said executrices filed their first account charging themselves with $286,865.95, and claiming credit for $4,203.52, for debts paid and expenses of administration, leaving $282,653.43 for distribution; and of this the sum of $84,256.87⅔ was distributed to each legatee, leaving still undivided $29,382.80, in uncollected notes, and cash in bank. Over $30,000 of this sum distributed to said Charles H. Utermehle was in fact advanced to him by his grandmother in her lifetime, and shortly after the death of his grandfather.

285 May 5, 1893, said Charles H. Utermehle executed a power of attorney to Charles W. Handy, a real-estate agent in this city, empowering him to receive, invest and manage all his money and property, to consult with and employ counsel learned in the law, in all matters and things relating to his real and personal property and estates, and to commence and prosecute all actions necessary or advisable in relation to his affairs.

On June 6, 1893, Eugene Carusi, Esq., wrote a letter to the attorney of said executrices of Sarah Utermehle's will, Wm. R. Woodward, Esq., wherein he said he was authorized by his client, Charles H. Utermehle, to give notice that all overdue notes held by said executrices should be converted into money forthwith by enforcing the trusts securing the same; and that his client would insist that they make good out of their separate estates any loss that might occur by their failure so to do.

After the statement of their first account, the said executrices paid from time to time by checks additional amounts to said caveator, either personally or to his said attorney-in-fact, Mr. Handy. These payments continued to be made and received as late as August 4, 1899.

Said caveator received as devisee under his grandfather's will an office building known as the "Young's law building," at corner of Sixth street and Louisiana avenue, this city, which he took possession of at once after the probate of the will of George W. Utermehle, and from which he collected the rents for two or three years, when he sold it for $20,000.

After the death of his grandmother he made several deeds of trust by which he conveyed his undivided one-third interest in square 765 on Capitol Hill to which his grandmother obtained title under her husband's will to secure loans; and afterward his

286 interest in said square was sold out under one of said trusts for $13,500.

June 9, 1900, Charles H. Utermehle filed a caveat against the will

of George W. Utermehle, in which he says he "doth, hereby, contest the said probate and the validity of said paper-writing, so purporting to be such last will and testament," and avers "that said paper-writing ought not to be held operative either as a will of real or personal property." The grounds for contest are therein stated to be that said George W. Utermehle was not of sound and disposing mind and capable of executing a valid deed or contract at the time of making said paper-writing; that the execution of said paper was obtained by undue influence practiced upon said George W. Utermehle by Rose M. Taylor and Leroy M. Taylor, Sr., or one of them, or some other person unknown to him; and that its execution was procured by fraud and coercion exercised upon said George W. Utermehle by the said parties.

He therefore prayed that the probate of said paper-writing as a bill of personal property should be set aside; and that it should be refused probate as a will of real estate; and that issues be framed for trial by jury to determine the fact as to the validity of said paper-writing.

July 19, 1900, the caveatees, Rose M. Taylor and Mamie E. Norment filed an answer to said caveat, in which they deny the averments therein made as grounds to set aside the probate of said will; and in which they also plead the statute of limitations as contained in the act of Congress of June 8, 1898, applicable to wills before that time admitted to probate; and in which they also set up the several acts of said caveator in relation to the said wills and estates of his grandfather and grandmother, hereinafter recited, and plead the same as an estoppel against said caveator.

287 They also filed, on the same day, a petition asking that said will of George W. Utermehle be admitted to probate as a will of real estate.

In this petition, after reciting the proceedings before stated, and the acts of the said caveator claiming and holding property as aforesaid under the said will, they state that they never made any claim to the property received by him; and that they had no cause to suspect that said caveator would dispute the validity of said will; and they had conveyed portions of the estate received by them to *bona fide* purchasers, they and their grantees relying upon the said conduct of said Charles H. Utermehle as shown by the records herein; and by reason of such conduct they say he is estopped now and forever hereafter from disputing in this or any other proceeding the validity of said will. Nevertheless they say he filed the caveat aforesaid, and thereby undertook to assail the validity of said paper; and on June 23, 1900, he entered a suit in ejectment against Rose M. Taylor to recover a one-third interest in real estate which was devised to the caveatees by said George W. Utermehle, by which he intends to assail the validity of said will; and that he is about to enter a similar suit against the petitioner, Mamie E. Norment.

To the end that their title may be quieted, and that of their grantees, they ask that said paper-writing be admitted to probate as a will of real estate, and that said Charles H. Uterme-

cited to appear and show cause, if any he has, why it should not be so admitted.

To this petition said Charles H. Utermehle filed a caveat on September 27, 1900, in substantially the same words as those used in the caveat filed June 9, 1900, but making no denial of the alleged facts which caveatees had set up in said petition as constituting an estoppel, and no reference thereto in any manner.

288 To this last caveat said petitioners filed an answer, October 30, 1900, in which they again set out the act of said caveator in waiving citation, and consenting to the probate of said will, and they again plead the statute of limitations of June 8, 1898. To this plea exceptions were filed by the caveator, November 17, 1900.

November 3, 1900, said caveator filed a further answer to so much of the petition of Rose M. Taylor and Mamie E. Norment filed July 9, 1900, as avers alleged facts relied upon as constituting an estoppel.

Reserving all benefit, etc., by reason of the errors, &c., of said petition, and denying that this court has jurisdiction to determine the question of alleged estoppel, he answers at great length, setting out such facts as he claims are sufficient to excuse him from estoppel asserted by the caveatees, which in brief are, that he was only about 23 years old when his grandfather died; that he was ignorant of his rights; and that the day after his grandfather's funeral, his grandmother agreed to make her will in such way as to make him equal with each of his aunts in the property left by his grandfather; and relying on that promise he took his legacy and devise under the will; that after his grandmother died and he found she had only left him equal with his aunts in the property she owned, he was still ignorant of his rights; and he was very sick for some six weeks, and afterwards limping about with rheumatism for two years; that he had no knowledge of his grandfather's mental incompetency to make a will or of undue influence and fraud and coercion practised on him by Mrs. Taylor and her husband, until about May, 1900, when he had consulted counsel, and under advice had written a letter to each of the caveatees, offering to account with them for their interest in the real and personal property he had received directly under his grandfather's will, and denying the valid-

289 ity of said will.

He further alleged, that as soon as he was advised of his rights and had knowledge of the true facts affecting the validity of said will, he "at once repudiated all interest under the same." He concluded this answer by asking that an issue be framed as to the question of estoppel and sent for trial to a jury with the other issues before asked.

November 17, 1900, he filed a similar paper as a replication to so much of the answer of said caveatees filed July 19, 1900, as avers certain alleged facts or actions upon his part relied upon as constituting an estoppel or bar against him from proceeding under his caveat to question the validity of said alleged will.

March 18, 1901, a petition was filed by Leroy M. Taylor, Senior,

suggesting the death of Rose M. Taylor on January 22, 1901, and asking the substitution of himself in his own right and as trustee, and of Leroy M. Taylor, Junior, and Mildred Taylor and Dorothy Taylor, in place of said Rose M. Taylor, which the court ordered to be done.

Thereafter, on March 27, 1901, on these pleadings, the said issues were framed, and the effect of the said plea and answer of the said statute of limitation was reserved for further consideration by the court.

In the trial of these issues the said caveator has been made plaintiff and said caveatees defendants, as there is no issue as to the fact of the formal execution of said paper-writing as a will of both real and personal property.

The principal part of the evidence thus far introduced is the testimony of the plaintiff and of his mother, Mrs. Naomi Utermehle. The issue of estoppel as here framed involves questions of both law and fact; but if upon the whole evidence the case is one re-
290 quiring the determination of the court as to its effect, rather than an ascertainment by the jury of what the facts are, then it seems to me to become wholly a question of law.

There are very few questions in the present condition of the case that would seem to require the consideration of the jury.

If the court was correct in its ruling when the question of the plaintiff's ignorance of the law was allowed to be asked, then the fact of whether he was or was not ignorant would be such a matter as should be determined by the jury on all the facts and circumstances of the case.

Also the question of his ignorance of any evidence as to the testamentary capacity of the testator and the alleged undue influence, fraud and coercion, could properly be submitted to the jury for their determination, if that was in doubt and became a controlling feature of the case.

Giving him, however, the benefit of his own testimony and all the other evidence, to the fullest extent, and allowing all fair inferences that would seem to arise therefrom, I think the evidence now before the court is not sufficient to sustain a verdict in favor of the caveator on either one of the two issues of estoppel; and if the facts were submitted to the jury and they should conclude therefrom that the plaintiff was not estopped, and answer these issues in the negative, I should feel it my duty with my present understanding of the law properly applicable to the case, to set the verdict aside and grant a new trial.

I am convinced by the examination of authorities and by reflection, that the plaintiff cannot be heard in this case to say that he was ignorant of the law. If a litigant could be permitted to prove his ignorance of the law by his own statement of that fact, his adversary could in no way contradict it; for what is or is not,
291 in the mind of any one, cannot be shown in the absence of some act or expression which could disclose it to others.

It is said that the maxim "Ignorance of law excuses no one," is

founded not only on expediency and policy but on necessity. As is well stated by one court, "If ignorance of law could be admitted in judicial proceedings as a ground of complaint, or of defense, courts would be involved and perplex with questions incapable of any just solution, and embarrassed by inquiries almost interminable, until the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground of exemption; and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judgments would be founded."

Herdigree *v.* Mitchum, 51 Ala., 151.
Williams *v.* Thwing Electric Co., 160 Ill., 526.
Weed *v.* Weed, 94 N. Y., 243.
Meckley's Estate, 20 Pa. St., 478.
Zollman *v.* Moore, 21 Gratt., 313.
1 Story's Eq. Jur., sec. 111.

Counsel for plaintiff also claim that the caveator was ignorant of facts—was ignorant of his rights.

There are many cases where parties ignorant of their rights have been, within a reasonable time and after information on that subject, permitted to change their previous positions; but the word rights in such cases is generally interpreted to refer to facts, or facts and law combined; and in most of such cases I think it will be found that the other party to the litigation has taken advantage of their ignorance, or has in some way contributed to conceal the facts and keep them in ignorance. In this case, however, the only
292 wrongs complained of by the caveator relate to the alleged exercise of improper influence or fraud in the procurement of the execution of the will of 1887, and the alleged quieting promise of his grandmother made to him the day after the testator's funeral. At most, this could not have influenced him longer than during the life of his grandmother, for on her death, early in 1893, he knew, or could have known by inquiry, just what estate she had, and how she had kept her promise. It is quite evident from the circumstances in proof that he then had the advice of counsel learned in the law, and if he was ignorant of any rights he would have been informed of the same. It is strongly urged, however, that he was ignorant of any ground upon which to contest the will until May, 1900, and for that reason he should now be permitted to repudiate his claim under the will and be allowed to contest it, the same as if he had refused to accept its provisions, and had filed his caveat, instead of his consent, when the same was first offered for probate.

All these evidential facts which he says he only learned in 1900, were accessible to him in 1889, and the caveatees did nothing to keep him in ignorance of them; certainly nothing is claimed to that effect after March, 1893. He admits that he knew the greater part of the real estate that his grandfather owned at the time of his death; and he knew how many and who the heirs were, what his legal rights would be if there was no will.

From 1889 to 1900 he was consistently claiming, receiving and enjoying the property formerly belonging to his grandfather, directly under the will of George W. Utermehle, or directly under the will of Sarah Utermehle, who was herself estopped by her election to take under her husband's will, and her legatee and devisee would be equally estopped from disputing its validity, unless
293 he can be excused by reason of his said ignorance. There is no other excuse offered, according to his own testimony, that has any semblance of sufficiency. He says he was sick for six weeks shortly after his grandmother's death; but aside from that he furnishes no evidence of want of capacity, physically, or mentally, to exercise all the diligence and care that a prudent and reasonable man is required to do to ascertain his rights and protect them by legal proceedings.

During all this time he was bound to know that other parties claiming under said will were treating the property devised to them as their own; selling it or conveying it in trust, or otherwise changing their positions in relation to the same, which they had the right to do, relying upon his conduct in doing the same with that received by him.

Under these circumstances I am constrained to hold that the ignorance relied upon does not give him a right to repudiate the position first taken and so consistently held for so many years, and to now assume a position directly contrary thereto, whether he is willing to surrender the property held by him, or to account for the same, or not.

The doctrine of election so fully argued by counsel does not strictly apply to this case. It applies usually to a case where the widow has a right under the law to accept the provisions of her husband's will, or to renounce them and take under the law. She has a choice of two properties. If she intelligently and fairly elects to take one, she cannot usually be allowed to change her mind thereafter, and take the other, and never where her first election is persisted in for many years. Or, where a legatee or devisee is given a property under a will, and by the same will some one else is given a property to which he has a title outside the will, he must relinquish the property to which he before had the title, so that the will then disposes of his own property as well as that of the
294 testator.

In this case, however, assuming the will to be valid, there was no choice for the caveator but to accept its provisions, or nothing. If he had concluded to take nothing, but wished to assert his rights as heir, on the theory that the will was invalid, then the only choice or election open to him was to accept the provisions of the will, notwithstanding it was invalid, or enter a proceeding to set it aside. He does not claim ignorance of these rights at the time of his grandfather's death; but what he claims is he was ignorant of evidence on which to base a litigation to contest the will, and therefore he accepted its provisions.

It seems to be admitted in argument that unless the circumstances

of this case are such as to excuse his delay in changing his position, he will be estopped; and hence his counsel have brought into court all the evidence available relating to the question of estoppel, and to such excuse; and they contend that if he now offers to account with the caveatees for all the property received by him under his grandfather's will, he should have the right to proceed with the contest, notwithstanding his election and delay because what he has received, and which is now held by himself or his grantees under the will, is less than what he would be entitled to if the will should be set aside and he should take title under the law.

Unless there is a valid excuse for the long acquies-ence in the situation occasioned by his first position, he cannot be allowed to change, although he now offers to give up or account for all the property claimed and still held under the will.

There is no such excuse, in my judgment. His negligence in ascertaining evidence on which to base a contest, cannot ex-
295 cuse his active conduct in asserting rights under the will.

He must be considered, in the language of some of the authorities, to have been wilfully ignorant; and such ignorance of facts, where a reasonable man of full age neglects the means of information which ordinary prudence would suggest, will not be allowed to relieve him from an estoppel.

Thiebaud *v.* Vevay Bank, 42 Ind., 222.

Strosser *v.* Ft. Wayne, 100 Ind., 443.

2 Pomeroy's Equity Jur., sec. 839.

The doctrine of estoppel as understood in this day is no longer characterized as odious, as it was in the days of Coke, but it is now regarded as one of the most important, useful and just factors of the law. It is daily administered in courts of law as well as courts of equity; and its whole force is usually directed to preclude parties, and those in privity with them, from unsettling what has been fairly and reasonably determined.

The acts and statements of the plaintiff and his neglect to intimate any purpose to dispute the validity of the will for so many years, during which time parties and witnesses have died, and positions of parties have changed, should now preclude him from disputing its validity forever, in any court, both as a will of personal property and as a will of real estate, whether the same is admitted to probate or not.

Whether the usual doctrine of election, or acquiescence, or estoppel, or laches, or waiver, or inconsistent positions, is strictly applicable in this case or not, or whether all of them are applicable or not, the facts and circumstances now disclosed by the evidence are such that upon reason and general principles of law and equity, I am forced to the conclusion that the caveator was estopped against the caveatees on June 9, 1900, and on September 27, 1900, the days on which the caveats were filed, from disputing the validity
296 of said paper-writing.

His counsel have argued the case upon the assumption that

the facts alleged as to testamentary incapacity and undue influence, fraud and coercion were established or admitted facts, and, therefore, that the court should be astute to favor him and to exercise all its powers, actual or presumptive, to prevent the defendants from benefiting by their own wrong.

This argument prejudges the case made by the pleadings and record herein. The allegations of wrong-doing and of want of testamentary capacity are all denied; and the argument in the line suggested cannor fairly go further than to suggest that the plaintiff ought to have a chance to produce the evidence he claims to have discovered in 1900, as against the conduct he has before pursued, and the evidence to be produced by the caveatees, so that the respective strength of the two contending parties may be tried.

In other words, the argument of counsel seems to be that his contention is the correct one; and that, although it may appear inconsistent for him to receive and retain property, real and personal, under a will which he repudiates and says is no will, while he experiments in the courts with evidence he claims to be sufficient to establish such fact, and which would, if established, furnish him another and inconsistent title to the same property, as well as to other property which under the existing state of the record belongs to the caveatees, nevertheless he has the legal right so to do and is entitled to all the consideration *now* that he should have if his claims were admitted or established by proof.

That he may now waive the title under the will and claim under the law, although no such claim could be logically made until after the litigation sought to be inaugurated had actually resulted in a judgment in his favor.

297 He cannot, in my judgment, take money under a will and hold and use it to defray the expenses of a litigation to destroy the will, with a chance that he may by such destruction get a different title to it, and to more pro-erty now held under the same instrument by other parties.

The fortunes of the contestants in a court cannot be determined in advance; but the right of either to inaugurate or maintain the suit against the other on the merits, must often be determined in some form, regardless of the prospect that either party may have to succeed on the merits if the suit is allowed to proceed. To that extent only does the present motion in fact go; and the judgment now pronounced does not in any way determine the question as to which party is correct on the other issues, *provided* they could be tried.

The merits of the issues on the question of estoppel should therefore be considered and determined without prejudging the merits of the controversy on the remaining issues.

For these reasons I shall grant the motion of the caveatees, and instruct the jury to return a verdict in their favor on all the issues, because when it is determined that the caveator is estopped to dispute the will, there is no one to contest it further, and they are entitled to have the other issues disposed of and the will duly probated, its execution being admitted.

The COURT: Gentlemen of the jury, after this somewhat tedious recital of this case and the hearing that has been had, I have reached the conclusion that under the law I shall instruct you to return a verdict for the caveatees. You will, therefore, answer these questions as follows:

"Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E.
298 Norment, from disputing the validity of said paper-writing dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property."

That you should answer yes.

Mr. PERRY: If your honor please, we desire to note a separate exception to each one of these sections as you give them. We except to that instruction.

The COURT: Yes.

"2. Was the said Charles H. Utermehle, on the 27th day of September, 1900, estopped as against the said Rose M. Taylor and Mamie E. Norment, from disputing the validity of said paper-writing, dated the 7th day of December, 1887, as the last will and testament of the said George W. Utermehle, as a will of real estate?"

That you should answer yes.

Mr. PERRY: We except to that instruction and to the other also, on the ground that a question of fact has been raised in this case which must, on the testimony, be submitted to the jury, and that all the presumptions are in favor of the truth of the testimony upon this motion which we argued.

The COURT (reading):

"3. At the time of the execution by said George W. Utermehle of said paper-writing, dated December 7, 1887, as his last will and testament, was the said George W. Utermehle of sound and disposing mind and capable of executing a valid deed or contract?"

That you should answer yes.

Mr. PERRY: We except to that, for the same reasons. We except to it for the further reason that we are prepared to offer testimony as to that issue, which the court debars us from doing.

299 The COURT: Yes.

Mr. WORTHINGTON: The record shows, your honor, that they offered to prove by Mr. Terry that he was well acquainted with Mr. Utermehle about the time this will bears date, and before that, and that in his opinion he was not of sound mind. That is the only thing the record shows on that subject.

Mr. PERRY: I beg your pardon. The record shows that I announced at that time that that was only the first step and that we had a number of other witnesses prepared to testify upon the same point.

Mr. WORTHINGTON: To give their opinion?

Mr. PERRY: Yes; and also upon all the other points involved.

Mr. WORTHINGTON: That is where I fear we may have some misunderstanding, and this is the time to avoid it. On the question of

undue influence, the only specific testimony that was offered, as I remember, was that of Mr. Terry and that of Mr. Hannum.

Mr. PERRY: Precisely, because we cannot put two witnesses on the stand at the said time. We put that one on the stand and announced that we had others ready upon the same point, as the record will show.

The COURT: I understood Mr. Perry to say he was ready to go on with the other issues.

Mr. WORTHINGTON: If my friend intends to rely simply upon the fact that they have proof which they offer bearing upon the issue of undue influence, without specifying what it is, I claim that is insufficient, and I want to be ready to make that point on
300 the record. If they have any specific evidence of that kind which they wish to offer, let them offer it so that I may have the benefit of an exception to it because it is perhaps not sufficient.

Mr. PERRY: We have one witness whom we introduced on the issue of undue influence and also on the issue of fraud, and we announced that we had others, as we have; and certainly we want the benefit of that in our exception. The court has understood that, if counsel have not. The court has announced that he is going to exclude testimony on all of these issues. We have testimony on all these issues.

Mr. WORTHINGTON: I only want it understood that I shall make the point that if only that general offer is made, it is insufficient, and that the court cannot rule out evidence without knowing something more about it than that in the opinion of counsel it bears upon the issue.

The COURT: I suggest that the statement about disposing of these issues of estoppel first was a suggestion that both of you concurred in, that all the testimony pertaining to those two issues was offered and put in evidence, with a view of having that determined before you went on with the other issues, in case it was determined in favor of the caveator; but in case it was determined against the caveator, of course it would stop the trial at that point; and that that was really the purpose of presenting that testimony first and arguing the matter of law at that point. I never understood but what the caveator had other evidence to go on and but what the caveatees had other evidence to go on those other issues.

Mr. PERRY: Precisely. That has always been the understanding, and your honor says he shall not go on, without regard to what evidence we have.

The COURT: Yes; I say the testimony so far taken is not
301 sufficient to relieve you from the estoppel that is pleaded in the case.

Mr. PERRY: Precisely; but I want to meet Mr. Worthington's point. He has notified us that he will insist in the Court of Appeals that we have not offered any evidence in respect to these other issues. What your honor has just said indicates what the understanding was.

The COURT: I understood it was not the purpose of counsel

on either side to offer any evidence on those issues at this time, and the purpose was to try and eliminate this issue of estoppel from the b-lance of the case, and have an opinion upon that.

Mr. PERRY: That is a little indefinite. Our purpose was not, of course, in fact to offer the evidence, because your honor was going to rule it out.

The COURT: No; but I understood the purpose of stopping at this time was to take the opinion of the court on this matter of estoppel first; that while you were ready to go on with the trial of the other issues on both sides, still you thought it might possibly be in the interest of economy of time to dispose of this question first.

Mr. PERRY: Precisely. Now what I want to appear on the record is that your honor had that understanding of it, that both of us were ready to go on with competent evidence on that point, and your honor declines to hear it. That is correct, is it not?

The COURT: That is my understanding about it.

Mr. PERRY: That is all I want.

The COURT: And of course that is the reason I decline here to pronounce judgment on the merits of this controversy, if there is one you can go into.

"4. Was the execution of said paper-writing, dated
302 December 7, 1887, by said George W. Utermehle, as his last will and testament, procured by the undue influence of Rose M. Taylor and Leroy M. Taylor, Sr., or either of them, or any other person or persons?"

That you should answer yes.

Mr. PERRY: We except to that for the same reason, that we have competent evidence to offer on that point, which we desire to be heard.

The COURT (reading):

"5. Was the execution of the said paper-writing, dated on the 7th day of December, 1887, by George W. Utermehle as his last will and testament, procured by fraud of Rose M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?"

That you should answer no.

Mr. PERRY: We except to that on the ground that we have competent evidence to offer under that issue, which the court excludes.

The COURT (reading):

"6. Was the execution of said paper-writing, dated December 7, 1887, by said George W. Utermehle, as his last will and testament, procured by the duress or coercion of Rose M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?"

That you should answer no.

Mr. PERRY: We except to that on the ground that we have competent evidence to offer in support of that issue, which the court excludes.

The aforegoing testimony and proceedings were all the testimony and the proceedings that were had upon the trial of the said issues.

303 And thereupon, and before the jury retired to consider of their verdict, this bill of exceptions was reduced to writing and all of the exceptions taken by the caveator during the progress of the said trial were embraced therein and the caveator, by h[illegible] counsel, prayed the court to sign and seal this *its* said bill of exceptions, which is accordingly done, and the said bill of exceptions is hereby made a part of the record in the said cause this 7th day of October, A. D., 1902, *nunc pro tunc*.

JOB BARNARD, *Justice.*

Filed Oct. 7, 1902.

LOUIS A. DENT,
R.
Register of Wills, D. C., Clerk of Probate Court.

304 In the Supreme Court of the District of Columbia.

In re Estate of GEORGE W. UTERMEHLE, Deceased. Orphans' Court. No. 3467.

Know all men by these presents, that we, Charles H. Utermehle caveator, as principal, and Abraham L. Saltzstein, as surety, are held and firmly bound unto the caveatees Mamie E. Norment Leroy M. Taylor Sr. Leroy M. Taylor Jr. Mildred Taylor and Dorothy Taylor in the full sum of one hundred dollars to be paid to the said caveatees Mamie E. Norment Leroy M. Taylor Sr. Leroy M. Taylor Jr. Mildred Taylor and Dorothy Taylor executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals, and dated this 11th day of June, in the year of our Lord one thousand nine hundred and two.

Whereas the above-named caveator Charles H. Utermehle has prosecuted an *an* appeal to the Court of Appeals of the District of Columbia, to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia holding a special term for orphans' court business:

Now, therefore, the condition of this obligation is such, that if the above-named caveator Charles H. Utermehle shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

CHARLES H. UTERMEHLE. [SEAL.]
ABRAHAM L. SALTZSTEIN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

This bond is satisfactory.

A. S. WORTHINGTON,
For Caveatees.

305 Approved the 11th day of June, 1902.

JOB BARNARD,
Justice S. C. D. C.

(Endorsement: Estate of George Utermehle. Bond for appeal to Court of Appeals. Filed Jun- 11, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

306 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. 3467.

Owing to the fact that Justice Barnard, who presided at the trial of this cause, is about to leave the city, it is hereby agreed between the counsel for the respective parties that the bill of exceptions may be submitted to him for settlement on Wednesday at ten o'clock a. m., or as soon thereafter as can be heard, the solicitors for the caveatees hereby waiving the notice required by law, and any further copy of the bill of exceptions other than what has been served upon them.

R. ROSS PERRY,
LAMBERT & BAKER,
Attorneys for Caveator.
A. S. WORTHINGTON,
Attorney for Caveatees.

(Endorsement: *In re* estate of George W. Utermehle. Stipulation that bill of exceptions may be submitted on Wednesday, June 18, 1902, and waiving notice and further copy of bill of exceptions. Filed Jun- 18, 1902. Louis A. Dent, register of wills, clerk of probate court.)

307 WEDNESDAY, *June* 18, 1902.

CHARLES H. UTERMEHLE, Plaintiff,
vs.
MAMIE E. NORMENT ET AL., Defendants. } No. 3467, Adm. Doc. 14.

Come as well the attorneys for the caveator as the attorneys for the caveatees and submit to the court, by agreement, the bill of exceptions in this cause; whereupon it is ordered by the court that the time for filing the transcript of the record in the Court of Appeals of the District of Columbia, on the appeal taken in said cause, be and it is hereby extended to and including Wednesday October 15, A. D. 1902.

(Endorsement: Estate of George W. Utermehle. Bill of exceptions submitted. Order extending time to submit transcript of record to Court of Appeals until Wednesday, Oct. 15, 1902. Filed Jun- 18, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

308 CHARLES H. UTERMEHLE, Plaintiff, vs. MAMIE E. NORMENT ET AL., Defendants. } Probate. No. 3467.

It is by the court ordered that the present April term, 1902, of the court be and it is hereby prolonged for the period of thirty (30) days for the purpose of settling and filing the bill of exceptions in this cause.

(Endorsement: Estate of Geo. W. Utermehle. Order prolonging term of Apr. court for 30 days. Filed Oct. 4, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

309 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. —.

Upon motion by counsel for the caveator it is, this 13th day of October, A. D. 1902, ordered that the time for filing the transcript of record in the above entitled cause in the Court of Appeals of the District of Columbia be and the same is hereby ordered further extended until and including Saturday, November 1st, A. D. 1902.

JOB BARNARD, *Justice.*

I consent.
A. S. WORTHINGTON,
For Caveatees.

(Endorsement: *In re* estate of Geo. W. Utermehle, deceased. Order extending time to file transcript of record. Filed Oct. 13, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court)

310 In the Supreme Court of the District of Columbia.

In re Estate of GEORGE W. UTERMEHLE, Deceased. No. —.

The following papers shall constitute the record on appeal in the above-entitled cause, to the Court of Appeals:

1. Petition for probate of will, filed April 26th, 1889.
2. Order probating will, filed April 26th, 1889.
3. Petition for modification, filed May 3, 1889.
4. Order on petition, filed May 3, 1889.

4½. Statement of executrix in lieu of account (omitting receipts) filed May 14, 1890.

4¾. Receipt of Chas. H. Utermehle filed May 14, 1890.

5. Caveat to will, filed June 9, 1900.
6. Answer of Rose M. Taylor *et al.* to petition and caveat of Chas. H. Utermehle, filed June 19, 1900.

7. Petition of Taylor *et al.* for probate of will as will of real estate, filed July 19, 1900.
8. Caveat to will, filed September 27, 1900.
8½. Motion for refusal to frame issues filed Oct. 18, 1900.
8¾. Motion to admit will to probate as will of real property filed Oct. 18 1900.
9. Answer of Taylor *et al.* to caveat, filed October 30, 1900.
10. Answer of C. H. Utermehle to petition, filed Nov. 3, 1900.
(The replication of C. H. Utermehle filed Nov. 17, 1900 is
311 omitted, but it is agreed that it contains in substance the same matter set up in the answer.)
11. Exceptions to plea, filed Nov. 17, 1900.
12. Exceptions to answer, filed Nov. 17, 1900.
13. Replication, filed Jan. 7, 1901.
14. Rejoinder, filed Jan. 7, 1901.
15. Petition of Leroy M. Taylor, suggesting death of Rosa M. Taylor, filed March 18, 1901.
16. Order appointing guardian, filed March 27, 1901.
17. Order making new parties, March 27, 1901.
18. Issues filed March 27, 1901.
19. Order making party plaintiff and defendant, Feb. 11, 1902.
20. Verdict sustaining will, April 7, 1902.
21. Motion for new trial, filed April 11, 1902.
21½. Proof of execution of will original and as will of real estate and affidavit of Norment & Taylor as to custody of will (all attached to original will).
22. Decree admitting will to probate, filed June 7th, 1902.
23. Bill of exceptions.
24. Proceedings on appeal.

R. ROSS PERRY,
WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Caveator and Appellant.
A. S. WORTHINGTON,
Of Counsel for Caveatees.

Oct. 16, 1902.

(Endorsement: Stipulation for record on appeal. Filed Oct. 16, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

312 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Louis A. Dent, register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 311, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of

the probate court, in case No. 3467 estate of George W. Utermehle deceased, wherein Charles W. Utermehle — appellant, and Mamie E. Norment, Leroy M. Taylor, Sr., Leroy M. Taylor Jr., Mildred Taylor and Dorothy Taylor — appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of one hundred dollars, was duly filed by said appellant, and approved by said court on the eleventh day of June, A. D. 1902.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said probate court, this 22nd day of October, A. D. 1902.

{ Seal Supreme Court of the District of Columbia, Probate Jurisdiction. }

LOUIS A. DENT,
R.,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1254. Charles H. Utermehle, appellant, *vs.* Mamie E. Norment *et al.* Court of Appeals, District of Columbia. Filed Oct. 28, 1902. Robert Willett, clerk.

WEDNESDAY, *April 8th, A. D.* 1903.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, Infants, by Leroy M. Taylor, Jr., Their Guardian *ad Litem.* } No. 1254.

On motion one half hour additional time allowed counsel in the argument. The argument in the above entitled cause was commenced by Mr. D. W. Baker, attorney for the appellant, and was continued by Mr. A. S. Worthington attorney for the appellees.

THURSDAY, *April 9th, A. D.* 1903.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, Infants, by Leroy M. Taylor, Jr., Their Guardian *ad Litem.* } No. 1254.

The argument in the above entitled cause was continued by Mr. A. S. Worthington attorney for the appellees, and was concluded by Mr. R. Ross Perry attorney for the appellant.

In the Court of Appeals of the District of Columbia.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT ET AL., Appellees. } No. 1254.

It appearing that the answer, "No, sir," to the question, "Did your report to Mr. Utermehle that you had that option," asked of Charles W. Handy on page 116 of the record near the top thereof, is incorrect, it is hereby agreed that the said answer should read as follows: "Yes, sir, I did." And it is further hereby stipulated and agreed that the record in the above entitled cause shall be corrected so as to show the correction herein made.

D. W. BAKER,
Of Attorneys for Appellant.
A. S. WORTHINGTON,
Of Counsel for Appellees.

(Endorsed:) Court of Appeals. No. 1254. Chas. H. Utermehle, appellant, *vs.* Mamie E. Norment, *et al.* appellees. Stipulation as to correction of record. Court of Appe*a*ls, District of Columbia. Filed Apr. 13, 1903. Robert Willett, clerk.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, Jr., and Mildred Taylor and Dorothy Taylor, Infants, by Leroy M. Taylor, Jr., Their Guardian *ad Litem*. } No. 1254.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia, sitting as a probate court, whereby the will of one George W. Utermehle, admitted to probate in the year 1889 as a will of personalty, was now also admitted to probate, under the act of Congress of June 8, 1898, as a will of real estate.

George W. Utermehle died in this city, whereof he had long been a resident, on April 16, A. D. 1889, leaving a large estate, both real and personal, of which the realty is stated to have amounted to upwards of one million of dollars in value, and the personalty to something approaching the same amount; and leaving also a will, or paper-writing, purporting to be his will, which bore date on December 7, 1887, and which appeared on its face to have been duly executed for the conveyance of real estate. In and by this will, after a bequest of $3,000 to each one of three several nieces, the testator devised to the appellant here, who was a grandson and a son of a deceased son, a piece of property in this city known as the Young law building, of the value of about $20,000; and bequeathed to him also a promissory note for $750, with the accrued interest thereon, secured by mortgage. To his wife, the grandmother of the appellant, he bequeathed all his personal property absolutely, and he devised to her in fee simple the real estate, which was their place of residence, namely, the whole of square No. 765 in this city. All the rest and residue of his real estate he devised in fee simple to his two daughters, Mamie E. Norment, then the wife of Samuel Norment, and Rosa M. Taylor, then the wife of Leroy M. Taylor, as tenants in common, with the proviso that if either daughter was not satisfied with the division thus made she should have only $5, and the whole of such real estate should go to the other daughter.

Mrs. Sarah Utermehle, the testator's wife, was made executrix of the will, with the request by the testator that, inasmuch as he had no debts and all the personal property was to go to her, only a very moderate bond should be required of her as executrix.

On April 26, 1899, Mrs. Sarah Utermehle, the widow and executrix of the deceased, propounded the will for probate. On the same day Rosa M. Taylor and Mamie E. Norment, the two daughters of the testator, and his grandson, the appellant, who were his only next of kin and sole heirs at law, executed and caused to be filed in the court a paper writing, whereby they waived citation and notice by way of publication, and consented that the court might act upon the

petition of the executrix for probate without further notice to them. On the same day the will was by order of the court duly admitted to probate—of course, only as a will of personalty, in accordance with the law of the District, as it then stood.

The executrix then gave bond in the sum of $20,000 for the payment of all just debts and claims against the deceased, all damages that might be recovered against her as executrix, and all the legacies bequeathed by the will, and letters testamentary were issued to her. She proceeded with the administration, paid the funeral expenses, and other charges, the legacies to the three nieces, and the legacy to the appellant of the promissory note for $750, with the accrued interest thereon, amounting to the sum of $2,116.88. She filed no inventory, but filed a statement of account in the particulars specified on May 14, 1890. The personal property, other than as thus disbursed, she retained for herself in accordance with the terms of the will, and converted it to her own use. It is stated that she disposed of a very large part of it in charities,

Beside the legacy of the note for $750 and interest, the appellant received his devise of the Young law building, sold it soon afterward for $20,000, and applied the proceeds to his own use. He also received from his grandmother, apparently in the way of a gratuity, sufficient money to pay a mortgage of $11,500, with some accrued interest, which rested on a farm that he had purchased in Frederick county, Maryland. During all this time he does not appear to have ever in any way manifested dissatisfaction with his grandfather's will, or protested against it.

Mrs. Taylor and Mrs. Norment, the daughters and principal devisees of the real estate of George W. Utermehle, entered into possession of that property forthwith, and made partition of it between themselves, each quit-claiming to the other. Immediately afterwards, on July 18, 1889, Mrs. Norment conveyed all her real estate to her husband, Samuel Norment, who died in possession of it in 1891. This conveyance by Mrs. Norment to her husband would appear to have been procured by some duress exerted by him. At all events, after his death proceedings in equity were instituted by Mrs. Norment to vacate the deed. She was the second wife of Samuel Norment, and had two children by him; but there were children by his first wife. The result of the proceedings was a compromise ratified by the court, whereby Mrs. Norment received substantially about one-third of all the real estate that had belonged to Samuel Norment.

The caveator was about 23 years of age at the time of the death of his grandfather. He testifies that pleasant relations existed between him and his grandfather, and apparently no unpleasant, although evidently no intimate, relations existed between him and other members of the family. He was present at the reading of his grandfather's will immediately after the funeral, and, although disappointed, made no objection thereto. On the next day at the suggestion of his aunt, Mrs. Taylor, he was present again at his grandfather's house, where there were assembled his grandmother, Mrs.

Sarah Utermehle; his aunts, Mrs. Rosa M. Taylor and Mrs. Mamie E. Norment, besides himself, and no one else, as it would seem. His account of what was then and there said and done is, in substance, that Mrs. Taylor did all the talking; that she stated that the will of his grandfather had virtually cut off the appellant; that it had been at the solicitation of Mrs. Taylor and her husband, Dr. Leroy M. Taylor, that his grandfather had left the Young law building to him; that his grandmother, however, would, at her death, equalize the matter for him, as she had all the personal property wherewith so to do; that his grandmother wanted to know the amount of the mortgage on his farm, as she desired to pay it for him, and that he thereupon stated the amount as being $11,500. The talking, as stated by him, was all done by Mrs. Taylor. He does not state that Mrs. Norment took any part in it, but that his grandmother seemed to assent to everything that was said by Mrs. Taylor, and that she repeated after Mrs. Taylor that she desired to pay the mortgage upon his farm, which she did in fact almost immediately afterwards.

This conversation the caveator now claims to have amounted to a promise made to him, that if he would not oppose the probate of his grandfather's will, his grandmother would equalize the matter for him in and by her own will. And he says that it was in reliance upon this assurance that he signed the paper by which he consented to the probate. He states, also, that some days afterwards he was requested by Mr. Woodward, who it seems was the attorney who had drawn the will, and was one of the witnesses to it, to go to the office of the register of wills; that he went and met there Mr. Woodward, Dr. Taylor, Mr. Norment, his grandmother, Mrs. Sarah Utermehle, Mrs. Norment, and Mrs. Taylor; that he was then asked to sign the paper, which the others had already signed, agreeing to the probate of the will; that he did sign it, but without reading it; that he said nothing at all; that thereupon either Dr. Taylor or Mr. Norment said to him: "That is worth $100,000 to you;" that he replied, "I am much obliged—is that all you wish me?" that they said, "That is all;" and that he then walked away.

On March 13, 1893, Mrs. Sarah Utermehle, the appellant's grandmother and the legatee of the personalty and devisee of part of the realty of George W. Utermehle, departed this life leaving the same heirs at law and next of kin as her deceased husband, and leaving also a will, executed on July 5, 1889, which date, as will be noticed, was within a little more than two months after the time of the alleged promise to the caveator that his grandmother would at the time of her death equalize his share of the estate, according to his own statement. In and by this will the testatrix divided her estate equally between her two daughters, Rosa M. Taylor and Mamie E. Norment, and her grandson, the caveator, giving one-third to each, and appointed her two daughters as her executrices with the request that only a nominal bond should be required.

Rosa M. Taylor, Mamie E. Norment, and Charles H. Utermehle executed and caused to be filed in court a paper waiving citation

and notice for the probate of this will and agreeing to such probate without further notice; and accordingly the will was admitted to probate on March 17, 1893. It seems, however, that some question was raised by the caveators, as to the allowance of commissions to the two executrices on the ground that this would give them an advantage in the estate, and they agreed to renounce their commissions. He made no objection then or afterwards on the ground of any alleged failure by his grandmother to perform the promise which he claims to have been made by her, as already stated. Under the administration he received his distributive share of the personalty, amounting to nearly $78,000, and the administration was settled and closed. He received also his share of the realty, consisting of square No. 765, which had been the residence of his grandfather and grandmother, made partition of it with his aunts, executed quit-claim deeds to them, mortgaged his own one-third part of it while it was yet undivided, and subsequently allowed it to be sold under the mortgage. This partition took place in 1895.

On May 19, 1900, when ten years had just elapsed from the final settlement of the estate of George W. Utermehle, and after the lapse of nearly seven years after the final settlement of the estate of Sarah Utermehle, the caveator addressed identical letters to his aunts, Rosa M. Taylor and Mamie E. Norment, in which he alleged that at the time of his grandfather's death he was under a misapprehension and ignorant regarding his alleged rights in his grandfather's estate; that misrepresentations had been made in regard to those rights and his interests in the premises; that he now denied the validity of his grandfather's will either as to realty or as to personalty; and that he tendered himself ready to account to Mrs. Taylor and Mrs. Norment for what he had received under the alleged will.

This notification, it seems, he followed up with a suit in ejectment and with a caveat filed in the probate court on June 9, 1900, against the validity of the will. Mrs. Taylor and Mrs. Norment answered the caveat, and at the same time filed a petition asking for a probate of the will of George W. Utermehle of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898.

Pending proceedings in the probate court upon this caveat, and before any issues had been formulated between the parties, Mrs. Rosa M. Taylor died on January 22, 1901, leaving a will executed on December 3, 1889, whereby she devised and bequeathed all her estate to her husband, Dr. Leroy M. Taylor, in fee simple, subject to an annuity of $3,000 a year in favor of their son and only child, Leroy M. Taylor, Jr., and also nominated her husband as the executor of her will. On March 18, 1901, this will was duly admitted to probate, and letters testamentary thereon were issued to Dr. Taylor.

Thereupon on the same day, Dr. Taylor filed his petition in these proceedings, in which he set forth the will of his deceased wife in his favor, and at the same time set forth a declaration of trust executed between himself and his son, Leroy M. Taylor, Jr., on Febru-

ary 15, 1901, wherein it was stated that the property devised and bequeathed to him by his wife in fee simple was in fact held by him under a secret trust between her and him for the benefit of their son Leroy M. Taylor, Jr., and his children, of whom there were then two, yet in their infancy, Mildred Taylor and Dorothy Taylor, with the reservation of certain rights and powers for himself; and he asked that he himself and all the persons named might be made parties to the present proceedings in the place and stead of Mrs. Rosa M. Taylor. They were accordingly made parties, and Leroy M. Taylor, Jr., was appointed by the court as guardian *ad litem* for his infant children.

At last the court determined that issues should be formulated between the parties, to be tried in the probate court itself, with a jury, under the act of June 8, 1898, and there were six such issues drawn up. The first raised the question whether the caveator was estopped to deny the validity of the will of George W. Utermehle as a will of personal property. The second raised the question whether he was estopped to deny the validity of the will as one of realty. In the third issue the question of testamentary capacity was raised; in the fourth, that of undue influence; in the fifth, that of fraud, and in the sixth, that of duress. The question of the application of the statute of limitations, which was raised by the caveat and petitions, and all other questions, were reserved for future determination by the court. The caveator, Charles H. Utermehle, was made plaintiff for the purpose of the trial, and all the other parties, as caveatees, were made defendants.

On March 17, 1902, a jury was empanneled and sworn in the cause, and the caveator proceeded to adduce his testimony, which mainly was that of himself. It was mainly addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for the caveator announced their testimony on this point as closed, they proceeded to offer testimony upon the other issues. To this the counsel for the caveatees objected and moved the court to direct a verdict against the caveator on the issue of estoppel, and following that upon all the other issues. The court ruled out for the time being the offer of the caveator to adduce testimony on the other issues than estoppel, and seems to have adjourned the jury for the purpose of consideration of the question of estoppel as now raised by the record and by the testimony in the cause. After such consideration the court instructed the jury to render a verdict against the caveator on each and all the issues, and the verdict was so rendered and recorded.

Thereupon an order or decree was rendered, confirming the order of the court of April 26, 1889, whereby the will of George W. Utermehle had been admitted to probate as a valid will of personalty; and now admitting it to probate also as a valid will of real estate.

From this decree the caveator, Charles H. Utermehle, has appealed to this court.

There are seven assignments of error: (1) That it was error

to hold that the caveator was estopped, at the time of the filing of his caveat, from disputing the will of George W. Uthermele as a wil of personalty; (2) that it was error to hold that he was estopped from disputing it as a valid will of realty; (3) that it was error to instruct the jury to return a verdict against the caveator on the issues of estoppel; (4) that it was error to direct a verdict against the caveator on all the issues; (5) that it was error to direct a verdict against the caveator on the issues that did not involve the question of estoppel; (6) and (7), which are merely duplications of each other—that it was error to exclude the testimony of the caveator as to certain alleged statements and declarations claimed to have been made to him by his grandfather as to his testamentary intentions towards the caveator.

1. Taking up the last of these assignments first, we find that the purport of the statements and declarations referred to is that George W. Utermehle stated to the caveator on one or two occasions, that if he, the caveator, would not take sides in certain legal proceedings then pending in which he, the grandfather, was involved, he, the grandfather, would leave to the caveator a share of his estate equal to that which he would leave to each of the caveator's two aunts. Now it is very plain to us that under the decision of the Supreme Court of the United States in the case of Throckmorton *v.* Holt, 180 U. S. 552, evidence as to such alleged statements was properly excluded.

It is argued, however, that notwithstanding that decision, such statements are admissible in evidence where there is question of the mental capacity of a testator. But we fail to see the force of this argument. No one questions, and least of all the cav-atees questi on, the mental capacity of George W. Utermehle at the time at which these statements and declarations are alleged to have been made. And if the meaning of the argument is that they tend to show his subsequent mental incapacity at the time of the making of his will, the plain answer is that they are utterly irrelevant and ineffectual for any such purpose.

2. The substantial question in the present case is that of estoppel. This question controls the whole case, and if the trial court has decided it correctly, the rulings upon other questions are of no consequence. We think that it did decide it correctly.

The doctrine is too well established to need either argument or citation of authority in support of it, that one, who takes a benefit under a will, can not thereafter be heard to dispute or deny the validity of the will, and it is needless to say that the doctrine is founded upon the plainest principles of justice. We do not understand that this rule of the law is in any manner questioned by counsel for the caveator, nor do we understand it to be denied that in the absence of fraud or misrepresentation the action of the caveator in the premises, as detailed by himself, would constitute a full and complete estoppel upon him to prevent him from contesting the validity of his grandfather's will. He agreed to the probate of that

will, and he took property under it, both real and personal, and that this, especially after the lapse of so long a period as eleven years that intervened between the probate and the filing of his caveat that led to the present proceedings, would constitute an estoppel, is very evident.

The claim, however, on behalf of the appellant is that what he did he was induced to do by misrepresentation and fraud; that he was ignorant at the time and for a long time afterwards of the law of estoppel, and that as soon as he discovered what he calls his rights, he notified Mrs. Taylor and Mrs. Norment, and repudiated the will of his grandfather, and offered to account to his aunts, in some way not very clearly defined, for what he had received under the will. This offer to account he regards as equivalent to a tender of the property received by him.

It is exceedingly improbable that all the caveator's relatives, including his grandmother, conspired to defraud this young man. It is more than probable that the promise, which was made to him, if any there was actually made, was that he should share equally with his aunts in his grandmother's estate; and this promise his grandmother fully and faithfully performed. But, however this may be, and even if the alleged promise was in fact what he now claims it to have been, it is difficult to see how a promise by his grandmother and subsequent failure on her part to perform it can constitute misrepresentation and fraud on the part of Mrs. Taylor and Mrs. Norment sufficient to induce the appellant to refrain for eleven years from contesting the validity of his grandfather's will. And this is absolutely all the misrepresentation and fraud that is charged or sought to be shown.

There is no pretense that Mrs. Taylor was not acting in good faith when she made the alleged promise on behalf of her mother; nor is there any pretense that Mrs. Norment was guilty of any fraud in connection with it when she merely stood by and said nothing. Neither of them made any promise whatever on her own account; nor is there either allegation or evidence of fraud, or fraudulent concealment, or fraudulent inducement of any kind practiced by them upon the appellant or held out by them on their own account on which he was led to act. That they were probably desirous to have the will of their father probated without controversy and its validity conceded may well be assumed, although it is not entirely apparent that they received any more of the whole estate under the will than they would have received under the law if there had been no will. But any desire which they may have had to avoid a possible contest can not be charged to them as fraud. We find no evidence whatever in the record of any fraud or misrepresentation on their part.

The only promise which was made was the promise of the appellent's grandmother, made, it is true, through Mrs. Taylor, but yet, notwithstanding that fact, the promise exclusively of the grandmother. And it was the grandmother who mainly, if not exclu-

sively, profited by the exclusion of the appellant from any large share in the estate. But if the plaintiff relied upon this promise and was induced thereby to forego any action against the will, and that promise was not afterwards performed by his grandmother, the remedy of the appellant was not to return to an attack upon the will, but was by action of some kind against his grandmother's estate, and he took no such action. Her delinquency, if there was any such, which we greatly doubt, should not be visited upon Mrs. Taylor and Mrs. Norment, who are not shown to have had any part in it.

Then, if there was no misrepresentation or fraud on the part of Mrs. Taylor or Mrs. Norment, it is wholly unimportant whether, at the time when he committed the acts which constitute the estoppel, the appellant was or was not ignorant of the law of estoppel. By those acts he led Mrs. Taylor and Mrs. Norment into a situation from which, notwithstanding the ingenious argument of counsel to the contrary, they cannot now be restored to their original status. Upon the faith of those acts and the probate of the will they surrendered their right to a large amount of personal property, and a large amount of real estate also, to which they would have been entitled in the absence of a will. It is impossible to tell from the record before us whether they fared any better with the will than they would have fared without it; but it is very evident that, by the bequest of the entire personalty by the will to their mother they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation and the attempt to do so would be wantonly to question titles that have long since accrued, including the very title which the caveator has himself disposed of, to the Young law building.

3. Certain cases are cited to show that, when a person has acted in ignorance of his legal rights under a will as to election whether to take under the will or to assert an independent title against the will, he will not be estopped, if in due time he tenders back to the executor what he has received under the will. These cases are Spread *v.* Morgan, 11 H. L. 588, and Watson *v.* Watson, 128 Mass. 152. But we do not understand that these cases are here applicable. It is, perhaps, a matter of minor importance that there is here no executor now in existence of the estate of George W. Utermehle to whom the appellant could tender back the amount of the personalty which he received from that estate; and perhaps it is equally unimportant that no tender of the real estate received and appropriated by the appellant under the will could be tendered back to such executor in any event, as such executor had nothing to do with the real estate. It is perhaps more important that the appellant has precluded himself from making any tender whatever of such real estate to anyone by the fact that he has conveyed it away; but assuming that such tender or surrender could be made by the appellant, and assuming that the offer to account which he has made is the equivalent of a proper tender, which is very greatly to

be doubted, but which we do not decide, yet the appellant's case is not governed by the authorities cited.

The two cases in question were cases in equity wherein, according to the rule of equity, a party was required to make his election as to which he would take of two inconsistent rights. In the first mentioned case, that of Spread *v.* Morgan, in the English House of Lords, a man had come into the possession of one piece of property under an ancient entail, and into the possession of another piece of property under a more recent family settlement. The details of the case are complicated, but it will suffice to say that it was inconsistent in equity for the party to hold both pieces as against another man who was also entitled in a subordinate manner to one of the pieces under the family settlement. He was required to elect which of the two pieces he would hold; or rather, the inquiry was whether he had in fact elected when a court of equity held that he should have done so. It appeared that he knew all the facts, but that he did not know that by the rules of equity he was bound to elect.

Speaking for the House of Lords, sitting as a court of appeal, Lord Chancellor Westbury said:

"It is true, as a general proposition, that knowledge of the law must be imputed to every person; but it would be too much to impute knowledge of this rule of equity. Election, as a question of intention, of course implies knowledge. There may be a series of unequivocal acts from which an intention to elect and the fact of actual election may be inferred; but under the circumstances of the present case, it does not appear to me that any such inference can be drawn."

And Lord Chelmsford, in the same case, said: "In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence."

In the case of Watson *v.* Watson, in the supreme judicial court of Massachusetts, three nephews and an uncle held a piece of real estate as tenants in common. The uncle died leaving a will, by which he made bequests of his personalty specifically to his nephews; devised about two acres of the common property, by specific description of it, to one of the nephews, James; devised 10 acres of the same property, by similar specific description, to a grandnephew, Horace; and devised the remainder of his real estate, specifically excluding that previously devised, to another nephew, Albert, for life, with remainder in fee simple to Albert's son. One nephew, Edward, received none of the real estate, and only a legacy of $50 in money. All the parties received their legacies and entered upon the lands devised to them, notwithstanding that, as stated by the court, the devises were ineffectual as against the cotenants, unless they had confirmed it.

It appears that all the parties were ignorant of the rule of law

laid down in Massachusetts in the case of Hyde *v.* Baldwin, 17 Pick. 303, by Chief Justice Shaw, which was this, as stated by the chief justice himself:

"It is now a well-settled rule in equity that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will; or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well-founded, which shall defeat or in any way prevent the full effect and operation of every part of the will."

Upon being informed of this rule two of the three nephews took no steps to restore to the executor the personal property which they had received, or otherwise to renounce their claims under the will, further than to sign a paper wherein they reserved to themselves the right thereafter to elect, upon a decision of the law, if they should desire. As to them the court held that the rule of law, as laid down in the case of Hyde *v.* Baldwin, applied. But the third nephew Edward, who had received a legacy of $50, but none of the land, stood, it was said, in a different attitude. "Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it." It was said by the court, in a suit thereafter instituted for partition of the whole property, that he could not be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate.

In that case the supreme judicial court of Massachusetts, by Mr. Chief Justice Gray, said:

"In this Commonwealth it has been decided, in accordance with the opinions of Lord Mansfield, Lord Loughborough, and Lord Redesdale, that the rule (that laid down by Chief Justice Shaw, as already stated) holds good at law as well as in equity. * * * But this doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts, is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. (Citing cases.)

"Where the law allows the probate of a will in either of two forms—in common form, *ex parte*, upon being presented by the executor, or in solemn form, upon the application of any person interested and notice to all others—a person who has received a legacy under a will proved in common form is permitted, on tendering

back the amount to the executor, or bringing it into court, to contest the validity of the will, and compel it to be proved in solemn form. Bell *v.* Armstrong, 1 Add. Eccl. 365, 374, and cases cited. Hamblett *v.* Hamblett, 6 N. H. 333; Holt *v.* Rice, 54 N. H. 398."

We have been at pains to cite these two cases *in extenso*, because they are the principal reliance of the appellant, and his cause was tried in the court below with special reference to the case of Watson *v.* Watson. But we are very clearly of opinion that the appellant is not aided by these authorities. His case is not one of election, but of estoppel. He made his election, when election was open to him; and he is now estopped from seeking that which he declined. It is idle for him to say that he did not know that he had the right of election, and that he acted in ignorance of his rights. Every man of ordinary sense and capacity is bound to know that he cannot take a benefit under a will and at the same time seek to overthrow the will. It was distinctly presented to him to make that election when he was asked to sign the consent to the probate of his grandfather's will; and he then made it, and he confirmed the election by taking his legacy and the real estate devised to him and disposing of it beyond the possibility of his ever being able to return it to the estate. The election referred to in the cases of Watson *v.* Watson and Spread *v.* Morgan is election between two inconsistent rights, not election between two inconsistent courses of action. At the time of the probate of his grandfather's will he knew, as well as he did at any time afterwards, that, if there were no such will, or if he could overthrow such will, he could get a larger share of his grandfather's estate than he could get, or did get, under the will. There was no ignorance on his part of any rights which he might have. What he discovered afterwards, if he discovered anything, was not an alleged right, but the testimony to support that right, which makes a very different proposition.

It is very plain from what is distinctly stated by the supreme judicial court of Massachusetts in the case of Watson *v.* Watson that the right of election there mentioned must have been exercised before the executor has settled his accounts, and before the position of any person in interest has been changed. It is idle to argue here that because the appellees in these proceedings are in possession of some of the real estate that belonged to George W. Utermehle, therefore the position of no one in interest at the time of the probate of his will has been changed. It is sufficient to say in answer to this argument that the action of the appellant enabled the executrix of George W. Utermehle to divert the whole of the personalty of that estate from Mrs. Taylor and Mrs. Norment, who would have been entitled to a large share of it in the absense of a will. They lost all right to this personalty; they lost all right to a large portion of the real estate, and it is not apparent that the appellant could compensate them for this loss by the surrender of all that he received under the will, even if he were in condition to make such surrender.

We are very clearly of opinion that it is not too late for the ap-

pellant to question the validity of his grandfather's will, and that he has estopped himself from so doing. His course of conduct, as conceded and proved by himself, conclusively and as matter of law operates as an estoppel upon him. There was nothing whatever in the case to be submitted to a jury; and the court was entirely right in directing a verdict for the caveatees. A verdict for the caveatees on the question of estoppel necessarily superinduced a verdict for them on the other issues.

4. We may add here that it is greatly to be questioned whether the probate court had jurisdiction in this case to formulate and try the first of the six issues which were drawn up—that of the estoppel of the caveator to dispute the validity of the will of George W. Utermehle as a will of personalty, or whether, if it had the jurisdiction, the issue should have been allowed under the circumstances of the case.

The will had been admitted to probate as a will of personal property in 1889, with the concurrence and consent of the appellant. Even if that consent had been procured by misrepresentation and fraud, as claimed by the appellant, that fact would have made no difference in the present connection. Acting upon that consent, the executrix took possession of the personalty and distributed it, in accordance with the provisions of the will, to the legatees therein, the principal part of it to herself as the principal legatee. She settled her account, and the administration was at an end; and there had been no case in court for ten years before the appellant's caveat was filed. Even if the will were declared null and void as the result of that caveat, the statute of limitations would interpose an insuperable bar to the recovery of that personalty, or of any part of it, by any administrator of the estate of George W. Utermehle, or by anyone else in interest.

Moreover, upon the caveator's own showing, he received one-third of his grandmother's personal as well as real estate, equal to what each one of his aunts received. Apart from the estoppel which would preclude him from denying that this was the money of his grandmother after he had received it as such, and presuming that it was lawfully and in fact the money of his grandfather, he received more of the personal estate of his grandfather, by the amount of the note for $750 and interest, than either Mrs. Taylor or Mrs. Norment received. With what propriety, then, or to what reasonable purpose could he seek to have the will declared void as a will of personalty? He would not be entitled to any more, or to as much as he actually received, if the will were so declared.

There was nothing in the appellant's caveat that justified the reopening of any inquiry as to the validity of the will of George W. Utermehle as a will of personal property, and it was an irregularity to have allowed it. But no harm has come from this irregularity, since the result has been to confirm the previous probate of the will and consequently the settlement of the personal estate thereunder.

From what we have said it follows that the decree appealed from must be affirmed, with costs.

And it is so ordered.

TUESDAY, *May 5th, A. D.* 1903.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, Leroy M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, Infants, by Leroy M. Taylor, Jr., Their Guardian *ad Litem*.
No. 1254. April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 5, 1903.

TUESDAY, *June 2d, A. D.* 1903.

CHARLES H. UTERMEHLE, Appellant,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, Infants, by Leroy M. Taylor, Jr., Their Guardian *ad Litem*.
No. 1254.

On motion of Mr. D. W. Baker of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Charles H. Utermehle, appellant and Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, infants, by Leroy M. Taylor, Jr., their guardian *ad litem* appellees, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 2d day of June, in the year of our Lord one thousand nine hundred and three.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Charles H. Utermehle as principal, and A. L. Saltzstein, as surety, are held and firmly bound unto Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., Mildred Taylor and Dorothy Taylor, in the full and just sum of three hundred dollars to be paid to the said Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., Mildred Taylor and Dorothy Taylor their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Charles H. Utermehle, appellant, and Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, infants by Leroy M. Taylor, Jr., their guardian *ad litem*, appellees, a judgment was rendered against the said Charles H. Utermehle and the said Charles H. Utermehle having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., Mildred Taylor and Dorothy Taylor citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Charles H. Utermehle shall prosecute said writ of error to effect,

and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES H. UTERMEHLE. [SEAL.]
A. L. SALTZSTEIN. [SEAL.]

Sealed and delivered in the presence of—

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

This bond is satisfactory
A. S. WORTHINGTON,
Of Counsel for Def'ts in Error.

[Endorsed:] No. 1254. Charles H. Utermehle appellant *vs.* Mamie E. Norment, *et al.* Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia. Filed June 4, 1903. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, infants, by Leroy M. Taylor, Jr., their guardian *ad litem*, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Charles H. Utermehle is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of June, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted June 6, 1903.
A. S. WORTHINGTON,
Of Counsel for Def'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-8—1903 Robert Willett clerk

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 190, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles H. Utermehle, appellant *vs.* Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., and Mildred Taylor and Dorothy Taylor, infants, by Leroy M. Taylor, Jr., their guardian *ad litem* No. 1254, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals at the city of Washington, this 10th day of June A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,980. District of Columbia Court of Appeals. Term No. 63. Charles H. Utermehle, plaintiff in error, *vs.* Mamie E. Norment, Leroy M. Taylor, Leroy M. Taylor, Jr., & Mildred Taylor & Dorothy Taylor, infants, by Leroy M. Taylor, Jr., their guardian *ad litem*. Filed June 20, 1903.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 63.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT ET AL., DEFENDANTS IN ERROR.

Brief of Caveator and Plaintiff in Error.

Statement of Case.

This is a writ of error to the Court of Appeals of the District of Columbia seeking the review of a decree of that court, affirming a decree of the Supreme Court of the District of Columbia, holding a special term for probate business, entered on the 7th day of April, A. D. 1902, admitting to probate and record a paper writing as the will of George W. Utermehle, dated the 7th day of December, A. D. 1887, as a will of real property, and confirming a former decree of the court of February 26, A. D. 1889, which admitted the will to probate as a will of personality (Rec. p. 43).

On the 16th day of April, A. D. 1889, one George W. Utermehle departed this life in the city of Washington, District of Columbia, leaving a large estate of both personal and real property—real property of the value of

$1,000,000, with a rental of $55,000 per year (Rec. p. 118), and personal property estimated to amount to about $600,000.

He left surviving him his widow, Sarah Utermehle; Rose M. Taylor, a daughter; Mamie E. Norment, a daughter, and Charles H. Utermehle, a grandson, the latter being the only child of Charles H. Utermehle, deceased, who was the only son of George W. Utermehle. Said George W. Utermehle left a paper-writing, purporting to be his last will and testament (Rec. p. 116), in and by which he made certain bequests to his nieces, and then devised to his grandson, Charles H. Utermehle, in fee simple, the property known as the "Young Law Building," and also the interest due and to become due on a certain $750 note alleged to be in his possession. All the rest and residue of his personal property, as well as square No. 765, the house in which he lived, he devised and bequeathed to his wife, and the balance of his real estate was devised unto his two daughters, Mamie E. Norment, wife of Samuel Norment, and Rosa Taylor, wife of Dr. Leroy M. Taylor, their heirs and assigns. His widow, Sarah Utermehle, was appointed sole executrix under the will.

The alleged will was produced in court, after the death of George W. Utermehle, by Samuel Norment and Leroy M. Taylor, who, on April 23, 1899, made oath that they received the same from the executrix after it had been opened and read in the presence of the family of the testator (Rec. p. 117).

A petition was filed in the probate court by the executrix asking that the will be admitted to probate, and on April 26, A. D. 1889, the alleged will was admitted to probate (Rec. p. 2), and letters testamentary granted thereon. Special bond having been given by the executrix on April 14, 1890 (Rec. p. 4), a paper purporting to be a sworn paper in lieu of an account was filed, appended to which was a receipt of C. H. Utermehle for $2,116.80 in full of the note

of $750 with interest. On June 9, 1900 (Rec. p. 5), a caveat was filed by the plaintiff in error, Charles H. Utermehle, to said alleged will, attacking the mental capacity of George W. Utermehle, and alleging that he was not of sound and disposing mind and capable of executing a valid deed or contract at the time that the said alleged will was made. The caveat also charged that the alleged will was obtained by the undue influence of and through the fraud and coercion of Rose M. Taylor and Leroy M. Taylor, Sr., or one of them, or by some other person or persons to the petitioner unknown. The caveat then prayed that the former probate of the will as a will of personalty be set aside, and that appropriate issues be framed to determine the allegations of fact as to the validity of the paper-writing.

To this caveat Rose M. Taylor and Mamie E. Norment, on July 19, 1900 (Rec. p. 7), filed an answer, taking issue with the allegations contained in the caveat, and setting up certain alleged facts which they claimed estopped the plaintiff in error, Charles H. Utermehle, from disputing in this or any other proceeding the validity of the paper-writing alleged to be the last will and testament of George W. Utermehle.

As such matter of estoppel, they urge the probating of the will as to personal property and the granting of letters of administration, concerning which, it is alleged, Charles H. Utermehle was advised and had signed a waiver of citation, consenting that the court might act without further notice to him. They further rely upon the taking of the devise and bequest to Charles H. Utermehle under the will, and allege that he held the real property until March 24, 1891, when he sold and conveyed the same; and that he demanded and received the payment of the legacy mentioned in the will; that under the will of his grandmother, he also took a one-third interest in the personalty and realty which was devised to her by the will of George W. Utermehle. Section 10 of the act of Congress of June 8, 1898, is

also relied upon as a bar to the further prosecution of the caveat.

On the same day there was filed (Rec. p. 11) by said respondents a petition to admit the said will of George W. Utermehle to probate as a will of real property, which recites substantially the same facts as are set up in the answer, as far as the acts of the plaintiff in error are concerned, and it is prayed that the paper-writing be admitted to probate as a will of real property, and that a summons be issued to the plaintiff in error requiring him to show cause, if any he have, why the last named paper should not be admitted to probate and record as a will of real property.

On September 17, 1900 (Rec. p. 17) Charles H. Utermehle, *answering* the citation requiring him to show cause why the alleged will should not be admitted to probate as a will of real property, which was issued on the petition filed July 19, 1900, as above set forth, filed another caveat to said will in which he set up substantially the same grounds against the validity of the will as in the first caveat, that is, mental incapacity and undue influence. On September 27, 1900 (Rec. p. 19), an answer was filed to this caveat in which section 10 of the act of Congress of June 18, 1898, was again set up as a bar, and the waiver of citation to the original will was also referred to therein and a copy thereof set out. (Rec. p. 21)

On November 3, 1900 (Rec. p. 22), Charles H. Utermehle filed an answer to so much of the petition filed on the 19th day of July, A. D. 1900, as avers certain alleged facts relied upon as constituting an estoppel against the filing by him of any caveat to the alleged will. In this answer, which is somewhat lengthy, appellant avers that the paper-writing has never been admitted to probate or rendered valid in any way as to real property, and he asserts that it is not a valid will or testament of either real or personal property; that its validity has been attacked by two caveats filed by him, which fully set out his objections thereto, and

that certain property was pretended to be thereby devised and bequeathed to him, but—

> "*that not knowing his rights at the time, and having been misled and basely deceived as to his rights, and as to what he might expect, by misrepresentations made by the the petitioner, Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment, and being also under a misapprehension and ignorant as to the real circumstances surrounding the alleged execution of said paper-writing, which circumstances he has been advised and believes and therefore avers, render said paper-writing null and void as a testamentary document, he did take said piece or parcel of ground and premises and did, under such circumstances and so believing, make sale thereof to satisfy his urgent needs; but, on or about the 19th day of May, A. D. 1900, having discovered the misrepresentations and fraud practiced upon him by the petitioners, and being, through divers persons, apprised for the first time of the true and infirm mental and physical condition of his grandfather at the time of the supposed execution of such will, and just learning also of the undue influence practiced upon deceased by the petitioner, Rose M. Taylor, and her husband, to secure the will in question; and of the fact, as disclosed to him for the first time through the medium of testimony given by both Rose M. Taylor and her husband, Leroy M. Taylor, in certain equity suits, that said parties had practically dictated and controlled both the actions and business of George W. Uttermehle during the last three years of his life, and that during said time deceased had been under their control and was habitually intoxicated and drunk through the excessive use of alcoholic stimulants, and respondent, having then for the first time consulted counsel as to his position and rights, and being for the first time made aware thereof, he at once advised petitioners of this discovery by sending them each a statement to that effect, and, having arranged to obtain the property comprised in said alleged devise, he forthwith informed petitioners, by letters sent to each of them on or about the 19th day of May, A. D. 1900, that he had been under a misapprehension*

and was ignorant regarding his rights, and had also been misled by misrepresentations made by those interested under said alleged will; that he had now been advised for the first time of what were his rights, and that said paper writing, which had never been probated as to real property or become operative as a will of such, was, in fact, invalid, and ought not to be held of any legal effect; wherefore that he had as a matter of fact only taken a one-third interest as tenant in common with the petitioners in the intended devise in question, and tendered himself ready to account to them for their two-thirds share in said property, which will more fully and at large appear, reference being had to a copy of said letters hereto appended, marked 'Exhibit 'A'"'" (Rec. p. 30).

In his answer he further explains the transaction in regard to the $750 note, and avers, upon information and belief, that the note had really been paid to George W. Utermehle during the life of his father, and that George W. Utermehle well knew the note had been satisfied, and therefore that the legacy mentioned was nothing more than an effort to make proper restitution to respondent in this regard; further, that the note was not in the possession or under the control of George W. Utermehle at the time of his death, and it is charged the pretended legacy was merely an artifice intended to deceive appellant, immediately upon the discovery of which and of the real condition of affairs by an examination of the testimony in certain equity suits and otherwise, he offered and tendered in and by said letters to make proper settlement regarding said pretended lagacy. Respondent further says that just after the funeral of George W. Utermehle, he, with said daughter and Sarah Utermehle, returned to the house where the alleged will was read, and at a meeting of the same parties held at the same place the following day, the petitioner, Rose M. Taylor, in the presence of said parties, announced to respondent that they realized that he had been cut off with almost nothing, but that there would be no difficulty in adjusting this, as

they had arranged with the widow, Sarah Utermehle (who, she declared, had received about one-half of the estate under the will) that she, Sarah Utermehle, by her will, would arrange matters justly so that respondent would receive ultimately as much of the estate of George W. Utermehle as each of petitioners, to which statement and agreement both Sarah Utermehle and Mamie E. Norment assented. That respondent, being ignorant and under a misapprehension concerning his rights as aforesaid, relied upon these assurances and promises of fair treatment, but, not regarding same in the slightest and without the knowledge of respondent, Sarah Utermehle did, three or four months after the death of her husband, make a will which is now on file in this District, by which her property is merely devised in three equal parts between petitioners and respondent, share and share alike, such disposition being the same disposition the law would have made had she died intestate; and it is further shown that at the time of her death Sarah Utermehle had less than two hundred thousand dollars, exclusive of certain promisory notes made by the several heirs at law, remaining of the large amount which she received from George W. Utermehle, it being charged that petitioners had systematically secured large sums of money from her, thereby rendering it impossible for her to keep faith with respondent, of which fact he was unaware until shortly after the death of Sarah Utermehle, when he was informed by petitioner, Rose M. Taylor, greatly to his surprise, that his grandmother had died comparatively a poor woman, and when he discovered the disposition that had been made of her property he was both surprised and pained to find that no regard had been paid by either the deceased or petitioners to their agreement to equalize respondent's share as one of the three heirs at law of George W. Utermehle, whereupon he at once censured and upbraided petitioners, especially the said Rose M. Taylor, for their want of faith. That at this time he was ignorant

of his rights, as well as of the facts that surrounded the original making of the will rendering same invalid. No opportunity had been afforded him to consult counsel, and shortly thereafter he was taken dangerously ill while in Frederick, Md., and was compelled to remain away from the District of Columbia until November, 1899, when, after having resided many years away, he returned to the District and for the first time received information which put him upon inquiry; he then, for the first time, about May, 1900, became apprised of his legal rights.

Further answering the allegations of estoppel, respondent declared that petitioners had no right to contend that he is estopped from asserting his rights when, as a matter of fact, he relied upon their false and fraudulent representations, believing the same to be true, while they well knew all the conditions surrounding the case, and not only were cognizant that the alleged will of George W. Utermehle, and the entire proceedings thereunder, were tainted with gross fraud, but must have known that once advised of the true state of facts, respondent would have promptly contested the validity of said paper-writing.

On November 17, respondent also filed a replication to the answer filed to his first caveat, which replication, it is agreed (Rec. p. 117), contains in substance the same matters set up in the answer. Respondent filed (Rec. p. 32) certain exceptions to the petition filed by Rose M. Taylor and Mamie E. Norment. These exceptions question the validity of section 10 of the act of Congress of June 16, 1898, as applying to vested rights, and also question the right to set up the act of Congress where a petition has been filed for the probate of a will under said act as a will of real property (section 10 of this act has since been repealed). Issue was joined on the several answers and replications filed (Rec. p. 33), and before the trial the death of Rose M. Taylor was suggested in a petition filed (Rec. p. 33), by Leroy M. Taylor, her husband, with a copy of her will attached, the same

bearing date the 3d day of December, A. D. 1889. This will devised all her property to her husband, Leroy M. Taylor, Sr.; attached thereto was an agreement by said Leroy M. Taylor, Sr., dated February 15, 1901, whereby he covenants to hold said property for certain purposes under an alleged verbal trust (Rec. p. 35). Under an order of court, Leroy M. Taylor, Sr., and Leroy M. Taylor, Jr., and his children, Mildred Taylor and Dorothy Taylor, were made parties in the place of Rose M. Taylor, deceased. On March 27, 1901, issues were duly signed by the court, which said issues are as follows:

> "1. Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property?
>
> "2. Was the said Charles H. Utermehle, on the 27th day of September, 1900, estopped as against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of real estate?
>
> "3. At the time of the execution by said George W. Utermehle of said paper-writing dated December 7, 1887, as his last will and testament, was the said George W. Utermehle of sound and disposing mind and capable of executing a valid deed or contract?
>
> "4. Was the execution of said paper-writing, dated December 7th, 1887, by said George W. Utermehle, as his last will and testament, procured by the undue influence of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or any other person or persons?
>
> "5. Was the execution of said paper-writing, dated the 7th day of December, 1887, by George W. Utermehle, as his last will and testament, procured by the fraud of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

"6. Was the execution of said paper-writing, dated December 7, 1887, by said George W. Utermehle, as his last will and testament, procured by the duress or coercion of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

"It is further ordered that the questions of the application of the statute of limitations and all other questions of law which could have been raised prior to the framing of these issues and not passed upon by the court during the course of the trial on said issues *shall be reserved for future determination by the court upon motion of counsel for any of the parties thereto.*"

A day having been set for trial, the court made an order making the plaintiff in error, caveator, Charles H. Utermehle, plaintiff, and the caveatees, Mamie E. Norment and the representatives of Rose M. Taylor, defendants. *After hearing the testimony on the question of estoppel, and that alone, the court instructed the jury to return a verdict in favor of the caveatees on all of the issues;* and on the 7th day of June, A. D. 1902, the court signed a decree admitting the will to probate and record. The record, from page 43 to page 174, contains the testimony that was offered in evidence at the trial. All of the testimony and the proceedings had in the case are set out in the bill of exceptions. On account of the fact that the case was decided on the issues of estoppel, in considering the testimony in this statement we will set out merely that which refers to these issues.

The caveator was sworn as witness and testified, among other things (Rec. p. 51), that his name is Charles H. Utermehle, and that he at present resides at 1132 Twelfth street, in the city of Washington. He used sometimes to ride around the city with his grandfather and go with him to the oyster wharf. That his grandfather was extremely pleasant to him, but had his own peculiar ways, of course.

That when he went to the house he saw grandfather, grandmother, and Mrs. Norment until she was married; does not think that he stayed all night at the house until after Mrs. Norment's marriage; was then a little over eight years of age; the marriage occurred in September, 1873. That on these evenings when he was at his grandfather's house after supper they often played dominoes, and his grandfather would retire at 8 or 9 o'clock and get up some time about 6. That on several occasions he went to market with him, and often went to the Eleventh street oyster wharf; that on Sunday, as a rule, Dr. and Mrs. Taylor came over to dinner or to tea; that witness left Sunday evenings about 4 or 5 o'clock; that sometimes he would stay all night. That on one occasion, before witness was 18, his grandfather took him in his buggy, this being about 1887, in the fall. Thereupon witness was asked the following questions:

Q. Now, Mr. Utermehle, just tell us in your own way and as fully as you can what your grandfather said to you on that occasion. In the first place, how did you happen to go in his buggy? You say this was on the occasion when he took you home in the buggy? How did he happen to do it on this occasion?

Mr. Worthington: Mr. Utermuehle, please do not state any conversation; you can state the preliminaries and so on, but when we come to conversation I want to object.

A. I did not know that there were any preliminaries to the matter; it was a simply a conversation.

Mr. Perry: Well, how did you happen to go in the buggy?

A. He said: "I am going up town this afternoon and I will take you in when you go."

Thereupon, upon request, Mr. Perry reduced to writing what he expected to prove in the answer to the last question as well as other questions to be put to the witness. The following offer was made:

"We expect to prove the testamentary declarations of George W. Utermehle in 1877. We expect

to follow that up by proof as to another declaration about the same intentions in 1882. Then we propose to offer the testimony of another witness as to a time somewhere between 1882 and the time of the testator's death, so it is not simply the declarations in 1887 that we expect to prove in answer to this question; but we expect to show a purpose formed at that time and adhered to up to near the time of the death of the said George W. Utermehle."

To which question and offer of proof counsel for the caveatees objected; the court sustained the objection and counsel for caveator excepted.

And thereupon he was asked the following questions:

Q. I will ask you to state whether or not on that occasion (referring to the conversation in 1877), your grandfather said anything to you with reference to a suit that was then pending in this court, brought by his sisters and others against himself, to which you were defendant?

A. He did.

Q. I will ask you what he said with reference to this suit?

Objection; objection sustained. Exception noted on the ground that the answer would be merely introductory to the main conversation about which it was proposed to interrogate the witness; and, in order to show the object of the conversation, Mr. Perry thereupon made the following offer:

"I offer to prove by this witness here upon the stand, duly sworn, the following facts: On that occasion a suit had been brought in the Supreme Court of the District of Columbia by the sisters of George W. Utermehle against himself and others, as defendants, claiming that he had fraudulently disposed of certain property for which he was trustee under his father's will and in which his sisters had an interest; that the witness, Charles H. Utermehle, Jr., was a party defendant to the said suit; that on the said occasion and during the said ride in the said buggy George W. Utermehle expressed to the witness, his grandson, great anxiety about the suit and requested him, the witness, not to have anything to do with

the suit, and then and there told him that if he would refuse to have anything to do with the suit, he, the grandfather, George W. Utermehle, when he came to make his will would leave him an equal share with his daughters of his estate."

This testimony was offered, first, as showing the disposition and feeling at the time of the testator towards his grandson; secondly, as in the nature of a contract on the part of the grandfather and grandson, that if he would take a certain line of action at one time the grandfather would do a certain thing in consideration of it; and thirdly, as showing what the testamentary intentions of the testator were at that time in connection with his sanity. It is offered under the issue of testamentary capacity as showing what his testamentary intentions were at a time when there was no intimation in this case that he was of unsound mind. A further offer was made to prove by this witness that he accepted the promise made by his grandfather to him in that connection, and, in point of fact, did not have anything to do with the suit otherwise than as a nominal party defendant thereunder. The court sustained the objection to the question and offer of proof, and counsel for the caveator excepted. Witness further testified that he had another conversation, in the '80's, '81, or '82, and had two or three conversations on the same subject. And then Mr. Perry dictated to the stenographer the following offer of proof:

"It is offered to prove by the witness that in 1881, the latter part of the year, the testator, George W. Utermehle, said to his grandson, when the grandson, Charles H. Utermehle, Jr., the witness, had spoken to him with reference to his mother's intention to make some improvements upon a certain lot of ground that she owned in this city, that he, George W. Utermehle, had a deed of trust upon this said lot and that the witness had better advise his mother not to make any improvements upon it; and then went on to say that the witness, Charles H. Utermehle, Jr., need take no care about his future

> as he, the testator, intended to provide for him equally with his other children."

To which offer objection was made by counsel for caveatees and objection sustained, and caveator noted an exception.

Witness further testified that he had another conversation in 1883, and then Mr. Perry dictated the following offer of proof:

> "It is offered to be proved by the witness upon the stand that, in the early part of 1883, the testator, George W. Utermehle, at his house in this city, referring to the general subject of the two preceding conversations, again stated to the witness that he intended, when he made his will, to give the witness his, the witness, father's share of his estate—"

to which offer counsel for the caveatees objected; the court sustained the objection and counsel for the caveator excepted.

Whereupon said witness further testified that when Dr. and Mrs. Taylor were at the house of his grandfather, their talk was almost always about his rents, repairs, etc., and suggestions were made to Mr. Utermehle to do this or that in the way of repairs or in reference to loans; that in 1883 witness saw very little of his grandfather, and that he was really not regularly in Washington from June or July of 1882; that he did not notice anything particular about the progress of the drinking habit of his grandfather up to 1882, and he could not testify as to what his condition was then as to drinking. From May, 1883, to December, 1887, he was in Frederick most all the time, with the exception of about four or five months in the early part of 1887; that he might have been in the city often for a couple or weeks, in 1885, and he saw his grandfather about the 8th of February, 1884; he was then 19 years old; came to Washington on his wedding trip; made a visit of possibly an hour at his grandfather's house; has no recol-

lection of how long he was in Washington in 1885, but may possibly have been in Washington during the winter of 1885 or 1886, but has no recollection of seeing his grandfather in 1885; he might have seen him once or twice in 1886; he was home at Christmas, 1886; he never stayed all night at the house after he left for Frederick, and has no recollection as to the condition of his grandfather in respect to drunkenness from the year 1886; that he saw his grandfather possibly a dozen times at his house in 1887; did not meet him anywhere else. Witness was in Washington from February until June or July, 1887; that he took dinner, Christmas, 1887, at his grandfather's house, accompanied by his wife. That his grandfather on that day appeared to be under the influence of liquor; that at this time his grandfather was not as active as he generally was, and that he came downstairs in the evening in his night clothes and the girl or woman went out in the hall and got him and took him back upstairs; that on this occasion he had the appearance of drinking more than at any other time during the whole year; that in 1888 witness lived in Frederick and was in Washington very little, possibly two or three times a year, until the winter time, 1889. Possibly he saw his grandfather four or five times in November or December, 1888; he came to Washington and was back and forth between Washington and Frederick several times each month from then until his grandfather's death. That his grandfather died April 16, 1889, and that during the months of January, February, and March, 1889, he went to see him possibly once a month. Found him generally lying on the sofa; he was rather feeble, stooped in his walk and seemed to have lost all interest in busines. Was present when he died; was there several times a day then two or three days before he died. That from December, 1887, until the time he died, witness never saw him down in the city at all; that witness did not see his grandfather sufficiently often from 1883 until his death to be able to give his opinion about his

mental capacity, and he does not express any opinion. Witness was in the real estate business in Washington awhile in 1887, but in June or July of that year returned to the farm near Frederick and remained there until 1893 or 1894 and continued to run it until 1899; that from 1895 to 1898 he ran the City Hotel in Frederick, and that he left Frederick in November, 1899, and came to Washington, and since that time has lived in Washington, except two or three days and possibly not over a week, when he was in Frederick. That during the last eighteen months of his grandfather's life from what witness saw of him witness thought he was getting feeble; he was weak and decrepit; that at one time witness went to see him in regard to getting some insurance on some plate glass, and then he offered him the piece of property of 27 acres on Queen's Chapel road, for sale, and said he would take $5,000 for it. That witness did not know of his grandfather attending to any business from December, 1887, until his death; that his grandfather always gave him a Christmas present anywhere from $50 to $100; that immediately after his funeral the will was read by Mr. Woodward at the house; that witness got up, when it was read, and never said a word, and Mrs. Taylor said, "You come over tomorrow;" the next day witness went over and went into the dining room and there were Mrs. Taylor and Mrs. Norment and the grandmother. They were all sitting around the dining-room table. Witness was not sure who began the conversation, but possibly Mrs. Taylor. Mrs. Taylor started the conversation by saying that the will had virtually cut witness off; that it was through the persuasion of the doctor and herself that he had been left the property at Sixth and Louisiana avenue; that his grandmother was left all the personal property, which almost, if not quite, equaled what they had received; *and that when she died she proposed to make him right, to make him equal with them by equalizing his share;* and, further, that she wanted to know what the

mortgage on his farm was; that she understood there was a mortgage on his farm, and that she wanted to pay it off. She wanted to start him out without any debt on it. His grandmother was sitting there at the time; they were all sitting together. When Mrs. Taylor made these remarks his grandmother did not say a word. He was asked what the mortgage was on his farm and told them $11,500. Mrs. Taylor asked it, and she said: "Ma wants to pay that mortgage off," and so forth. Mrs. Utermehle, the grandmother, simply smiled and acquiesced. She did not say a word. There was not a word said by anybody at all except Mrs. Taylor and himself. The only remark he made was what the mortgage on the farm was. They were all sitting at the table; they were very close together. This was in the dining room of the house, which was really the living room. Mrs. Taylor spoke in her usual tones, and Mrs. Utermehle smiled and nodded, and she made one remark; she said: "Yes, I want to pay your mortage; I want to know what it is." That was the time the question was asked about the mortgage. This was after Mrs. Taylor said her mother was going to equalize witness with the others. Witness' grandmother said, speaking of the mortgage, "I will fix that up for you right away."

Witness was then asked this question:

Q. I will ask you whether or not you believed what was then said to you as to what your grandmother would do when she made her will?

A. I did.

Q. Did you not have any doubt about it at that time?

A. None whatever.

Witness further testified that the interview was not very long, possibly three quarters of an hour or an hour. Witness was at that time twenty-three years old. That no money was given him then nor on that day. Witness recollects that his grandmother said she would give him a check for the mortgage in a few days, and witness then went home.

Witness further testified that a few days after he called at the house he was at H. J. Fagan's liquor store on Eighth street, and a cab drove up and a party brought him a note which said he was needed at once at the city hall. The note was signed by William R. Woodward. That he went up to the city hall and Mr. Woodward, Dr. Taylor, and Mr. Norment were standing in the office, and his grandmother, Mrs. Norment, and Mrs. Taylor were sitting there in front of the place. He was handed a paper, and they said that grandmother wished to administer on the estate and take out letters that day, and he was asked to sign it. He signed his name to it; did not read it at all; simply signed his name; it had already been signed by the other parties; said nothing at all. At the time he signed it, Dr. Taylor or Mr. Norment touched him on the back and said: "That is worth one hundred thousand dollars to you." Witness answered: "I am much obliged," and further: "Is that all you wish of me?" and they said: "That is all," and he walked out. That Woodward explained to him, when he went in, saying: "Your grandmother is anxious to take out letters today; just sign this paper, will you," and it was then handed to him and he signed it, and then the remark was made: "This is worth one hundred thousand dollars to you." Witness was not positive whether Mr. Norment or Dr. Taylor made the remark, but knows that it was loud enough for his grandmother and Mrs. Norment and Mrs. Taylor to hear. Then witness said: "Is there anything else you wish me to to do?" and they answered "No," and he walked out. Witness was given a check for five thousand and some hundred dollars and one for $5,000, for which he gave his note, and then was paid two thousand and some dollars in payment of a $750 note and interest, and that was the way the $11,000 was made up. That the $750 note was on file in Equity 8141; that witness had not much money at the time his grandfather died, and that his income was about $600 a year, and that he had the farm, for which he paid $16,500; that his grandfather

knew his financial condition; that witness lived continually at Frederick after the death of his grandfather, and that his grandmother died in 1893, and that during her life she lent him $20,000. That witness has no personal knowledge of the advancements made to his grandmother's daughters except what he has seen; that he received the property at Louisiana avenue and Sixth street under his grandfather's will and sold it for $20,000; that between the death of his grandfather and the death of his grandmother he did not do any act to attack his grandfather's will, and when asked why he did not, replied: "I relied on the promise made me the day after the funeral."

Q. By whom?

A. By Mrs. Taylor, in the presence of Mrs. Norment and my grandmother.

Q. You mean the promise you have testified to here?

A. Yes, sir.

Q. When he died, in 1899 or about that time, what knowledge, if any, did you have with respect to the law of estoppel?

This question and also the other questions below, as to the witness' ignorance of law, were objected to by counsel for the caveatees, but after argument on the objection had been partly heard the court decided to admit the evidence for the time being, reserving the question of its competency till a later stage of the case.

A. None whatever.

Q. What knowledge did you have, if any, with respect to your rights in the matter then and there?

A. None whatever.

Q. Did you have any knowledge with respect to what we lawyers call the doctrine of election, that is, a rule of law or equity that would prevent you, if you take any benefit under the will, from disputing it in any way?

A. I did not.

That at this time the witness was 23 years of age; that

he never studied law nor read any law books until very lately, and that he relied absolutely on the promise that was then made to him by Mrs. Taylor in the name of his grandmother, in her presence and in the presence of Mrs. Norment, and that at this time, i. e., the day after his grandfather's will was read, he had no knowledge whatever with respect to the facts that he has set out in his caveat.

Q. What *knowledge*, if any, did you have with respect to the testamentary capacity of your grandfather at the time he made the will?

A. *None whatever.*

Q. What *knowledge*, if any, did you have with respect to *undue influence* practiced upon your grandfather by Mrs. Taylor or any other person?

A. *None whatever.*

Q. What *knowledge* did you then and there have as to whether or not George W. Utermehle, at the time he made the alleged will, was of sound and disposing mind and capable of executing a valid deed or contract?

A. *None.*

Q. What *knowledge* did you then and there have as to whether or not this alleged will of George W. Utermehle was procured by the undue influence of Rosa M. Taylor or Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

A. *I had no knowledge.*

Q. What *knowledge* did you then and there have of any fraud on the part of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons, towards George W. Utermehle, in the procuring of this will?

A. *None whatever.*

Q. What *knowledge* did you have, then and there, of any duress or coercion on the part of Rosa M. Taylor or Leroy M. Taylor, Sr., or either of them, or of any other person or

persons, towards George W. Utermehle, in the procuring of this alleged will?

A. *I had none at all.*

Q. State what knowledge you had at that time of the habits of intoxication of your grandfather, and of the extent to which they had progressed.

A. I had no knowledge other than that to which I have already testified.

Q. To what extent did your knowledge then go of the association of George W. Utermehle with Mrs. Taylor and her husband in a business way?

A. I had no knowledge other than that Mrs. Taylor acted as a clerk for him and looked after his writing.

Q. And so far as her husband was concerned, how far did your knowledge then extend?

A. I had none whatever, except as to the conversation that I had overheard between them as to loans. That was all.

Q. To how late a period did the ignorance and want of knowledge referred to in the preceding questions relating to this particular time extend?

A. Until some months after I returned to Washington to live.

Q. In what year?

A. 1900. I came back here in 1899 and it was in 1900 that I first learned of anything of the kind.

Witness further testified that from the time of his grandfather's death down to the time of his grandmother's death nothing was said to him of any change of intention on her part, and that after her death, the next morning in the dining room, Mrs. Taylor spoke to him; could not say whether Mrs. Norment was present or not. Mrs. Taylor said: "Well, ma is dead; she was very liberal during her life; had she lived a few years longer she would have died a poor woman;" that she had very little left of what she got from

his grandfather; and witness did not say anything more than that he was surprised to hear it. After the funeral they all returned and the will was read and witness could not understand much about it; had a conversation with Mrs. Norment and Mrs. Taylor a day or two afterwards, and they said the grandmother was worth about $200,000, and then he remarked that it was a surprise to him; that he understood the personalty was worth almost, if not quite, equal to the real estate, and that he always understood the real estate would run up a million and two hundred thousand dollars; that he could not see how the personal property should have depreciated so much in two years, and Mrs. Taylor said there was no use in discussing it, and that "Ma had given to charity," and had given to this and that, and witness remarked: "Well, I guess I will have to stand it, then." A few days after that witness went to Frederick. The remark that witness made was: "This will is a great surprise to me and I presume it knocks me out entirely, something I did not anticipate." That witness anticipated an entirely different will; did not know what to do; that he went back to Frederick a few days after that and was taken sick with rheumatism and never came back to Washington to attend to any business in regard to his grandmother's estate or anything of the kind. Witness executed a power of attorney to Charles W. Handy, who attended to all these matters and gave receipts for him. Thereupon he was asked the following question:

Q. Now, why did you not then put the matter in a lawyer's hands?

A. Well, I kind of thought I could not get much out of that will of my grandmother's and I thought my grandfather's will was so far back that I had nothing to do; at least, I was entirely indifferent; I lost heart; my health was bad at the time, and I had other troubles and things; my health was in pretty bad shape; I was sick in bed with rheumatism possibly five or six weeks, and I was really, for eighteen months

after that, more or less subject to limping and walking around and having pain.

And he further testified that he did not entirely recover until 1895; was suffering from a combination of inflammatory and sciatic rheumatism. That in 1893 witness was drinking to some extent; that he had financial troubles as well as troubles in private affairs; that he was never able to actively attend to business after his grandmother's death until he took the City Hotel in 1895; that witness got about sixty thousand dollars and a third interest in the square on Capitol Hill from his grandmother's estate, and his interest in that square was sold under a deed of trust for $13,500.

Thereupon the following question was put to him:

Q. Now, Mr. Utermehle, when was it that you first learned any facts with respect to your grandfather and his will that you did not know before, and what was the occasion of it?

A. The occasion started with my mother telling me, one evening, that she had been down to talk with Mr. Terry.

Witness further testified that he went to see Mr. Terry, and that his mother went to see Mr. Lambert, and Mr. Lambert came up to the house about four or five o'clock one evening, by appointment. Witness and Mr. Lambert then went to look over the papers in the grandmother's estate in the Orphan's Court, and then they looked at the papers in Norment *vs.* Norment, which witness had never read before, and also the case which involved the $750 note, and that he had further conversation with Mr. Lambert, and after looking at the facts testified to in the several cases, took Mr. Lambert's advice and mailed the letter, heretofore referred to, tendering back his property; that two letters were mailed, one to Mrs. Taylor and one to Mrs. Norment, and that he did not receive any answer to either letter, and that no answer had been received to either of them up to this day, and that he had received no communication from

Mrs. Taylor or Mrs. Norment; that he continued his search for information and facts, interviewed a large number of persons from whom he learned quite a few things in regard to his grandfather's capacity and in regard to his actions; a good deal about his drinking habits, and also learned a great deal about his business relations with Dr. Taylor and his wife; that every bit of information received was laid before Mr. Lambert and he was instructed to file the caveat that was filed in the case. That there was no executor of his grandfather's estate when he made the tender in the letter set out in the record, there being none appointed after the death of witness' grandmother, who was executrix under the will; that he was in a position to carry out his promise at the time that he wrote the letter making the offer of tender. That he knew quite a good deal of his grandfather's property at the time of his death, and that he never heard of any other will made by his grandfather, except the one mentioned by Mr. Perry in his opening statement as having been made in 1859; that his grandfather, up to three or four years preceding his death, or possibly a little longer than that, in conversation with witness, talked very little, and would not hold any protracted conversations with witness; his grandfather was not, in December, 1887, transacting any business at all; that the last business he knew him transact was early in the summer of 1887, and that from the time in December that he signed the will to the time of his death he did not transact any business; *that when the will was read after the funeral, witness did not notice the date, and that his attention was not called to the date of the will until Mr. Lambert called his attention to it in 1900. That from the reading of the will he was led to believe that the will had been made quite a few years before his death because it referred to the $750 note, which to witness' own personal knowledge, had been paid in 1884.*

Thereupon was offered in evidence a citation issued to witness to appear in court on Tuesday, the 31st day of July,

A. D. 1900, and show cause why a paper-writing, dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, should not be admitted to probate and record as a will of real property.

On cross-examination, witness testified that in the spring of 1882 he was about seventeen years old, and that he generally spent the summers away from the city, and that he went to Frederick in 1882, and that he visited his grandfather when he was from ten to eleven years old, from Fridays to Sundays, possibly fifteen times a year. That he used to go there every Christmas until he went to Frederick; that he did not notice any indications of unsound mind up to 1882; that he lived in Frederick from 1882 until February, 1887, when he went into the real estate business with S. D. Newcomb in the city of Washington, and remained there until the middle part of June; that during this period he went back and forth to Frederick, and that during this period he went to see his grandfather about a half a dozen times; he could not say whether he was drunk or sober, and did not notice that he was drunk; that at Christmas, 1887, he seemed to be drinking, and witness testified exactly to his actions during his visit on that occasion; that on this occasion he was given a Christmas gift of either $50 or $100; thinks the money was handed him by Mrs. Taylor; that he was giving it to all of them; that he was back and forth between Frederick and Washington between Christmas of 1888 and the day he died; that he saw him on two or three occasions between that time. Witness here identified certain checks which were endorsed by him, and also a power of attorney given to Charles W. Handy, which power was signed at Frederick, was witnessed by C. H. Doll, a resident of Frederick City; that Mr. Handy came there when witness was sick in bed and got the power of attorney; power of attorney was dated the 5th day of May, 1893; that witness did demand that the executrixes under

the will should act without commission, and that they agreed to do so; this agreement was arranged before he was taken sick; that they agreed with Mr. Carusi and Mr. Handy; that he discussed the division of the estate with Mr. Handy and also with Mr. Carusi, who was a friend of witness; that he did not authorize Mr. Carusi to see them about the matter, but thinks that Mr. Handy and Mr. Woodward had a great many conversations about it; that, however, he did not know of his own personal knowledge that they had agreed to act without commissions; that he thinks he was informed by Mr. Handy or Mr. Carusi, but he was not certain of that. Then was offered in evidence a letter of Mr. Carusi directed to Mr. Woodward in regard to the realizing on some deed of trust notes, the date of the letter being June 6, 1893; that witness also agreed to certain payments of money as gifts prior to his being attacked with rheumatism; and then were offered in evidence certain checks and receipts, which appear on pages 86, 87, and 88 of the record. And then was offered in evidence a paper showing the distribution of the notes of the estate of Sarah Utermehle, July 1, 1893, which distribution showed that Mrs. Taylor, Mrs. Norment, and witness received one-third each. Witness further testified that certain misrepresentations were made to him by Mrs. Taylor, among others that she did not carry out the promise that was made to him by his grandmother on the day immediately after the reading of the will so as to leave witness a sum to equalize his share with the others; that Mrs. Taylor told him that the personal estate left by his grandfather to his grandmother was almost, if not quite, equal to the estate that was left them, and that when she died she would leave him so that he would be equalized with them all, and that his grandfather had left his money in that way, intending that his grandmother should take care of him. That from these remarks witness inferred that the personalty was equal or almost equal to the realty. In other words, his estate was in two equal parts, half being

in realty and half being in personal property, and that it was understood that when his grandmother died she would leave him in such a way that he would be equalized with the others; that Mrs. Taylor never said that in exact words, but that was the natural inference to draw from what she said. Witness further testified that until May, 1900, he thought the statement made him at the time of his grandfather's death was true, and that if the statement that she only had $400,000 worth of personalty was true, the other must have been false, and therefore it had been misrepresented to him; and he further found out that her will was made almost immediately after his grandfather's death; that witness did not discover these circumstances until 1900, and that in that year he discovered that his grandfather had been controlled in all his business relations, as set out in the replication; that witness considered the promise made after his grandfather's death in the nature of an agreement, on account of his action at the time; however, there was nothing said about his attacking the will, but it was simply said that witness had been left out of the will; and it was through the persuasion or instrumentality of Mrs. Taylor that he was left anything at all; and that when he was told of this and it was understood that when his grandmother died she would leave things to equalize him, he said: "Well, that is all right; I will do that." That witness, at the time of his grandfather's death, believes his grandmother was left a good deal more than six hundred thousand or seven hundred thousand dollars worth of personalty in addition to the realty; that witness was completely prostrated when the will of his grandmother was read, and, as he puts it, he said to Mrs. Taylor, the day after the conversation took place in regard to the little furniture and things to be given away:

> "So far as I am concerned I have got the worst of it and I have got to stand it. I never made but one mistake in my life, and that was when I held still once before, and now I have to stand still."

That his best recollection is that Mrs. Norment was there; also he is positive she was there when the conversations took place; that witness was here about ten days after his grandmother's death, but during this period he thinks he went to Frederick; that when he went to Frederick he had no intention of remaining there; that during the ten days he was completely knocked out, but that there was not anything to prevent him from employing counsel, if he had known what he knows now; witness further testified as to his habits in 1893, as to his being at certain places, certain affairs, and further, that, when he signed the waiver of citation, Mr. Woodward said to him: "Your grandmother is here and would like to take out letters on your grandfather's estate today and we would like for you to sign this paper." That his two aunts were there and but six people present; that witness was ready to procure the property mentioned in the letter and prepared at any time to carry out the letter; that he supposed he had received about eighteen hundred dollars rent before he sold the Young Law Building, but that the rents down to date would be in the neighborhood of $10,000; that he had made all arrangements with his attorney, Mr. Lambert, to get whatever money was necessary to carry out the letter, and that he was willing to have charged against him that portion of the estate of Sarah Utermehle which he took as his distributive share, and that he was willing to deliver back the property and the supposed legacy of the $750 note; that all arrangements in regard to the money were made with Mr. Lambert and Mr. Handy. Then was offered in evidence the deed of trust of witness' interest in square No. 765. Then was offered in evidence another deed of trust bearing date September 3, 1896.

And further to maintain the issues on his part joined, the caveator produced Wilton J. Lambert, who testified (Rec. p. 114), in substance that he was a lawyer; has been a member of the bar since 1894, and knows Charles H. Utermehle

very well, and that he is the Wilton J. Lambert spoken of in the testimony as the person with whom Mr. Utermehle consulted, and that a request was made on the part of the caveator to obtain sufficient money to tender to other parties what he had received under the will of his grandfather, and that witness made these arrangements and had under his control upwards of $30,000 in cash, about $25,000 of which was money that he could use as he pleased, and that he assured Mr. Utermehle that the tender could be made good, and that he had sufficient money to substantiate the tender and make it good; that witness had the money from the time the letter was written until several months thereafter. That no response was received from Mrs. Taylor or Mrs. Norment directly, but that he received a response from their attorneys. Mr. Woodward was always their attorney, but the first response that witness had to the letter was from Mr. Worthington. About two or three days after the letter had been sent witness was called into Mr. Worthington's office and Mr. Worthington informed him that there was going to be a contest; that Mr. Woodward was to see him, representing the Taylors, and that the matter was going into litigation; that witness remarked that as it was then the approach of summer, they would do their best to keep them busy all summer; that the word "contest" or "fight" was used in connection with the conversation, probably both; and witness was informed that the letter had been received. He had no further reply to the letter, but met Mr. Worthington once or twice after that in the corridor in the court house, and the conversation was confirmatory of the first conversation. He also met Mr. Woodward, and he talked on the same lines. Having received these declarations, and having received no further response to the letters of tender, witness told Mr. Utermehle there was going to be a fight, and as they announced that fact there was no necessity for a further tender. Witness informed Mr. Utermehle of the first conversation

within a few minutes after it occurred. Mr. Utermehle was in witness' office when he went back from Mr. Worthington's office. On cross-examination witness testified that he had arrangements so fixed that he was able to obtain the cash the moment he saw fit to obtain it. That he could have obtained $45,000 or more; that the figure, however, given to Mr. Utermehle, was $30,000. Mr. Perry here stated that no tender had been made under the grandmother's will, but there was an offer in the pleadings to account for that part.

Thereupon Charles W. Handy was produced as a witness and he testified that he was a real estate broker in the city of Washington; he stated that in May, 1900, Mr. Utermehle requested him to procure an option on the Young Law Building; that he telephoned Mr. George A. Easterday in the Ames Building, who, witness understood, had the property for sale. He, however, found out that Early and Lampton had it up; he was telephoned that he was given an option, and the option was for $25,000, and whether it was for three or four weeks witness was not sure; it was certainly for three or four weeks; that it was all verbal.

Thereupon it was agreed (Rec. p. 118) that evidence had been offered tending to prove that George W. Utermehle, at the time he made his will, and at the time of his death in April, 1889, had real estate of the value of $1,000,000, and that the rental thereof was $55,000; that no inventory was filed of the personal property and special bond was given, and that the said George W. Utermehle died possessed of a large personal estate which, by the terms of his will, was all bequeathed to his widow, excepting certain legacies; and then was offered in evidence (Rec. p. 119) the will of Sarah Utermehle, which will was witnessed by three witnesses and dated the 5th day of July, 1889, and which divided her property equally between Rosa M. Taylor, Mamie E. Norment, and Charles H. Utermehle, share and share alike, and appointed Mrs. Norment and Mrs. Taylor

executrixes, which will was duly admitted to probate on the 17th of March, 1893, Charles H. Utermehle waiving citation thereof (Rec. p. 120). And then was offered in evidence the agreement disposing of certain personal property (Rec. pp. 121, 122) of Mrs. Utermehle, said agreement being signed by Charles H. Utermehle through Charles W. Handy, his attorney; then was offered in evidence (Rec. p. 122) several papers showing the amounts received by the next of kin of Sarah Utermehle, each one receiving $84,257.87, either in money, securities, or property. Then was offered in evidence (Rec. p. 123) a deed made by Rosa M. Taylor et vir to Mamie E. Norment, being a deed conveying to Mrs. Norment her share of the estate devised under the alleged will. And then was offered in evidence (Rec. p. 127) a deed of Mamie E. Norment and Samuel Norment to Job Barnard, conveying the same property, the deeds bearing date the 18th day of July, 1899, the property being conveyed to Job Barnard as trustee; and then a deed of Job Barnard, trustee, on the same day, conveying the property to Samuel Norment. And then was offered in evidence (Rec. p. 128) the original bill in the case of Mamie E. Norment *vs.* Clarence F. Norment et al., wherein Mamie E. Norment alleges that the several deeds were obtained from her by fraud and duress and threats of Samuel Norment. Whereof she prayed that she be decreed to be full owner in her own right in fee simple of all of said real estate conveyed by her to her husband through the said Job Barnard, trustee, and then an accounting. To this bill answers were filed, and then a compromise was entered into whereby a part whereof was reconveyed to Mrs. Norment, and the balance, as near as practicable, was conveyed to Ellie Norment and Harry Norment, children of Mamie Norment.

Thereupon it was further stipulated and agreed (Rec. p. 157) that Mrs. Rose M. Taylor, in the month of May, was seized of all the real estate which she derived under her father's will, except certain parcels which had been sold for

the purposes of partition, which were of the value of about $40,000; and that Mamie E. Norment was seized, in the year 1900, of real estate derived by her under the will of her father, of the value of not less than $100,000, and that no other will of George W. Utermehle than that offered in evidence with this case has ever been filed in the office of the register of wills in the District of Columbia.

And thereupon Thomas F. Woodward was duly sworn as a witness on behalf of the caveator, and he testified (Rec. p. 157) that he was a member of the bar and one of the attorneys in the case, and that he has not in his possession any will of George W. Utermehle, and that he has no knowledge of any other will of George W. Utermehle than that which was offered for probate here, and that he has acted as attorney for the caveatees in this case since May, 1900, and acted as their attorney in the case of Norment *vs.* Norment, and also in the estate of Sarah Utermehle; that he became attorney in Norment *vs.* Norment in 1892, and that he was a witness to the will of Sarah Utermehle.

And thereupon Harry Norment, being duly sworn, testifies (Rec. p. 158) that he is one of the grandsons of George W. Utermehle, and that he has no knowledge of any other will of George W. Utermehle than the one which has been read in evidence in this case.

And thereupon Ellie Norment Booz was duly sworn and testified (Rec. p. 158) that she was a daughter of Mrs. Norment and the granddaughter of George W. Utermehle, and that she had no knowledge of any other will of the late George W. Utermehle than the will here in question; that she had a faint recollection of when George W. Utermehle died, and that she never heard of any other will and knows of no other will.

After offering this testimony the attorneys for the plaintiff in error informed the court that it was all of the testimony that they had on the question of estoppel, but that they had a large number of witnesses on the issues of undue influence

and testamentary capacity, and in order to make the record properly show this, the attorneys for the plaintiff in error offered witnesses separately on the other issues in the case. Counsel for the defendants in error objected, and the court, after hearing argument, sustained the objection and instructed the jury on all of the issues to return a verdict for the caveatees on the ground that the caveator was estopped. The colloquy between the counsel and the court and all of the action of the court in this matter appears in the record at pages 158 to 174. Upon an examination of this part of the record it will be seen that plaintiff in error excepted to the ruling of the court refusing to permit the witnesses to testify when offered, and also in instructing the jury as to their answers to the several issues. The court, having sustained the contention of the defendants in error, entered a decree thereafter on the 7th day of June, 1902, confirming the original decree of February 26, A. D. 1889, admitting the will to probate as a will of personalty and and admitting the will to probate as a will of realty.

From this decree an appeal was taken to the Court of Appeals of the District of Columbia, and that court, on the 5th day of May, 1903, affirmed the decree of the Supreme Court, and plaintiff in error then sued out the writ of error to this court.

Assignment of Errors.

1st. The court erred in holding that the appellant, the caveator, was estopped, at the time of the filing of the caveat, from filing the same to the alleged will of George W. Utermehle as a will of personalty.

2d. The court erred in holding that the appellant, caveator, was estopped, at the time of the filing of the caveat, from filing the same to the alleged will of George W. Utermehle as a will of real estate.

3d. The court erred in instructing the jury to return a

verdict against the caveator and in favor of the defendants in error on the issues of estoppel.

4th. The court erred in instructing the jury to return a verdict against the plaintiff in error and in favor of the defendants in error on all of the issues.

5th. The court erred in instructing the jury to return a verdict against the plaintiff in error in favor of the defendants in error, caveatees, on the issues that do not involve the question of estoppel.

6th. The court erred in refusing to permit the caveator to answer the questions contained in the record, which questions call for the statements and declarations of George W. Utermehle, deceased, as to his testamentary intentions towards the caveator, and also in not permitting the caveator to offer evidence of the several conversations that took place between himself and George W. Utermehle as set out in the record on pages 54 to 56, both inclusive, and in refusing to permit testimony to be offered as contained in the offer of proof made by the caveator, which said questions and offer of proof was as follows:

Q. Now, Mr. Utermehle, just tell us in your own way and as fully as you can what your grandfather said to you on that occasion. In the first place, how did you happen to go in his buggy. You say, this was on the occasion when he took you home in the buggy. How did he happen to do it on this occasion?

Mr. Worthington: Mr. Utermehle, please do not state any conversation; you can state the preliminaries and so on, but when we come to conversation I want to object.

A. I did not know that there were any preliminaries to the matter; it was simply a conversation.

Mr. Perry: Well, how did you happen to go in the buggy?

A. He said: "I am going uptown this afternoon and I will take you in when you go."

Thereupon following offer of proof was made:

> "We expect to prove the testamentary declarations of George W. Utermehle in 1877. We expect to

follow that up by proof as to another declaration about the same intentions in 1882. Then we propose to offer the testimony of another witness as to a time somewhere between 1882 and the time of the testator's death, so it is not simply the declarations in 1877 that we expect to prove in answer to this question; but we expect to show a purpose formed at that time and adhered to up to near the time of the death of the said George W. Utermehle."

To which question and offer of proof counsel for the caveatees objected; the court sustained the objection and counsel for the caveator excepted.

And thereupon he was asked the following questions:

Q. I will ask you to state whether or not on that occasion (referring to the conversation in 1877) your grandfather said anything to you with reference to a suit that was then pending in this court, brought by his sisters and others against himself, to which you were defendant?

A. He did.

Q. I will ask you what he said with reference to this suit?

Objection; objection sustained. Exception noted on the ground that the answer would be merely introductory to the main conversation about which it was proposed to interrogate the witness; and, in order to show the object of the conversation, Mr. Perry thereupon made the following offer:

"I offer to prove by this witness here upon the stand, duly sworn, the following facts: On that occasion a suit had been brought in the Supreme Court of the District of Columbia by the sisters of George W. Utermehle against himself and others, as defendants, claiming that he had fraudulently disposed of certain property for which he was trustee under his father's will and in which his sisters had an interest; that the witness, Charles H. Utermehle, Jr., was a party defendant to the said suit; that on the said occasion and during the said ride in the said buggy George W. Utermehle expressed to the witness, his grandson, great anxiety about the suit and requested him, the witness, not to have anything to do with the suit, and then and there told him that if

he would refuse to have anything to do with suit, he, the grandfather, George W. Utermehle, when he came to make his will would leave him an equal share with his daughters of his estate."

The court sustained the objection to the question and offer of proof, and counsel for the caveator excepted. Witness further testified that he had another conversation in the '80's, '81 or '82, and had two or three conversations on the same subject. And then the following offer of proof was made:

"It is offered to prove by the witness that in 1881, the latter part of the year, the testator, George W. Utermehle, said to his grandson, when the grandson, Charles H. Utermehle, Jr., the witness, had spoken to him with reference to his mother's intention to make some improvements upon a certain lot of ground that she owned in this city, that he, George W. Utermehle had a deed of trust upon this said lot and that the witness had better advise his mother not to make any improvements upon it, and then went on to say that the witness, Charles H. Utermehle, Jr., need take no care about his future, as he, the testator, intended to provide for him equally with his other children."

To which offer objection was made by counsel for caveatees and objection sustained, and caveator noted an exception.

Witness further testified that he had another conversation in 1883, and then the following offer of proof was made:

"It is offered to be proved by the witness upon the stand that, in the early part of 1883, the testator, George W. Utermehle, at his house in this city, referring to the general subject of the two preceding conversations, again stated to the witness that he intended, when he made his will, to give the witness his, the witness' father's, share of the estate."

To which offer counsel for the caveatees objected, the court sustained the objection, and counsel for the caveator excepted.

ARGUMENT.

In considering the several assignments of error we shall take up first those which relate to the most important question in this case—i. e., the question of estoppel; then the refusal of the court to admit certain evidence which the caveator attempted to offer and to which objection was sustained. As none of this evidence touches the question of estoppel, the refusal of the court to admit it in no way affected the ruling of the court in peremptorily instructing the jury to return a verdict for the caveatees. It therefore becomes important, before considering this question, to inquire whether there was anything in the record to warrant the court instructing the jury to return a verdict in favor of the caveatees upon all of the issues upon the ground that plaintiff in error was estopped from attempting to avoid the will.

The Question of Estoppel.

The question of estoppel involves the following propositions:

1. Can the defendants in error invoke the doctrine of estoppel in their behalf when one of them is a devisee under the will, and the others claim from a devisee, both of the devisees being charged with exercising undue influence or fraud in procuring the making of the will, and in making false and fraudulent misrepresentations in order to hide their fraud in obtaining the will, to prevent the will from being attacked by the plaintiff in error?

2. Whether, if the plaintiff in error (caveator) was ignorant of the facts surrounding the making of the will at the time that he acted under the will, such action estops him from attacking the validity of the will.

3. Whether, if the plaintiff in error (caveator) acted in ignorance of his legal rights, or was wanting in knowledge

of the rule which compelled him to elect, his acts, under such circumstances, constitute an estoppel. Provided—

4. That as soon as he discovered the facts that were unknown to him, and as soon as he became aware of his legal rights and obligations, he took the proper steps to repudiate his acts committed by him through ignorance. And this last proposition involves the following subordinate questions:

First. How should he repudiate his former action?

Second. Whether under the circumstances of this case the caveator made sufficient tender of the benefits received by him before he filed the caveat or commenced proceedings, or whether the caveator was compelled to make any tender whatever.

Before considering the legal definition of estoppel as laid down in the authorities, we desire to call the court's attention to first proposition.

Proposition I.

"Can the appellees invoke the doctrine of estoppel in their behalf when one of them is a devisee under the will, and the others claim from a devisee, both of whom are charged with exercising undue influence or fraud in the making of the will, and in making false and fraudulent misrepresentations to prevent the plaintiff in error from investigating the facts surrounding the making of the will, this last fraud being merely ancillary to the principal fraud charged."

The record in this case shows that Rosa M. Taylor, one of the original caveatees, is charged with fraud and coercion in obtaining the alleged paper purporting to be the will of George W. Utermehle; and further, that both Rosa M. Taylor and Mamie E. Norment are charged with making fraudulent representations and promises to the appellant in order to prevent him after his grandfather's death from

making inquiry as to the true state of facts surrounding the making of the will, and that Mamie E. Norment knew of the fraud imposed upon the plaintiff in error and was enjoying the fruits thereof. An examination of the authorities discloses that before a party can take advantage of the plea of estoppel he must be an innocent person, and as such innocent person must further do some act by reason of being misled by the conduct of the party alleged to be estopped. The fact is that the whole record is teeming with fraud and misrepresentations of the caveatees or those from whom they claim, and there is nothing in the record at all that in any way shows or attempts to set up any fraud or gross negligence on the part of the caveator. How, then, can these persons who are themselves, according to the record, guilty of fraud, come into court and say that the appellant is estopped from disputing the alleged will as against them, because he did certain acts which he was led into doing by the very misconduct, fraud, and misrepresentations of the parties attempting to set up such estoppel.

It is confidently insisted that such is not the law, and that the appellees have no right, in the present state of the record, to raise any question of estoppel that the court had no right to permit this question to be raised by appellees, who, by reason of their own misconduct, can not be regarded favorably in courts of either law or equity. The Supreme Court of the United States in the case of Neblett *vs.* McFarland (92 U. S. 193), speaking of the right of persons guilty of fraud to invoke the aid of the court, says:

> "Parties engaged in fraudulent attempt to obtain a neighbor's property are not the object of the special solicitude of the court; if they are caught in their own toils and are themselves the sufferers, it is the legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

The Court of Appeals in this case (Utermehle *vs.* Norment, 22 App., p. 31) seems to have misconceived the proposition

here contended for and to have confined the fraud to the conversation alleged to have taken place between the plaintiff in error and the other devisees under the will. It never was the intention of the plaintiff in error to confine the question of fraud to this conversation. It was contended that this conversation was fraudulently had for the purpose of lulling plaintiff in error; but the real fraud contended for in this case is the fraud that surrounded the making of the will, in which fraud the devisee, Mrs. Taylor, and her husband participated, being, according to the contention of plaintiff in error, the prime movers therein, and of which fraud the devisee, Mrs. Norment, had full knowledge, although there is no direct allegation that she participated therein. The conversation had between the parties in regard to plaintiff in error not attempting to disturb the will, is, therefore, merely ancillary to the main proposition of fraud in this case. The question for this court to decide is whether or not the defendants in error, claiming under the devisees and caveatees mentioned in this record, can set up estoppel against the contention of the plaintiff in error to protect them in their title to property that was acquired by fraud. In other words, suppose this will was a forgery and suppose the defendants in error or those from whom they claim knew that the will was a forgery, and, knowing that fact, took title to property under the void instrument, could they, if their title was attacked by the plaintiff in error, invoke the doctrine of estoppel to aid them in their fraud? It is respectfully submitted that they could not and that plaintiff in error has a right to prove as against them the fact showing their fraud.

Proposition II—Ignorance of Fact.

The next propositions that present themselves are those involving the ignorance of facts and of legal rights by the plaintiff in error (caveator) at the time that he apparently acquiesced in the will. We will first take up the question of

ignorance of facts, and then the question of ignorance of rights. It is contended, first, that if the caveator was ignorant of the facts surrounding the making of the alleged will at the time that he acted under the will, his action, while ignorant, in no way estops him from attacking the validity of the will; and in order to consider this question, as well as the second proposition contended for, which is that if the caveator acted in ignorance of his legal rights or was wanting in knowledge of the rule which required him to elect, his acts under such circumstances would not estop him from contesting the validity of the will under which he acted, it is necessary for us to apply the law relative to estoppel to the facts as developed, which have been fully set out in the statement of the case, and will only be referred to briefly in considering the law. Speaking of estoppel Mr. Bigelow says:

> "The cases, when carefully analyzed, show that all of the following elements must actually, or presumably, be present in order to create an estoppel by conduct.
>
> "First. There must have been a false representation or a concealment of the material fact.
>
> "Second. The representation must have been made with *knowledge of the facts.*
>
> "Third. The party to whom it was made must have been *ignorant of the truth of the matter.*
>
> "Fourth. It must have been made with the intention that the other parties should act upon it, and
>
> "Fifth. The other party must have been induced to act upon it."

It will thus be seen that in order to create an estoppel in this case the conduct of the caveator must have been such as to contain all of the elements hereinbefore set out. In other words, he must have made a false representation or concealed material facts, *having at the time knowledge of the facts*, with the opposite party ignorant of those facts, and his action must have been with the intention that the other

party should be misled by it and the other party must have been induced to act upon such misrepresentation.

In the argument of the counsel for the caveatees the only thing claimed by them to work an estoppel in this case was that other parties acted in a way different from in which they would have acted if the caveator had not permitted the original will to stand. No claim was made by them that the record included the other requisites which, according to Mr. Bigelow, are even more essential to the doctrine of estoppel than the one element attempted to be invoked by the caveatees. It is further apparent from the record and on behalf of the plaintiff in error, it is insisted that the question of estoppel in this case is a question of fact which should have been left for determination to the jury. The record as it stands, taking all the testimony as true, shows conclusively that the caveator was ignorant of the true state of facts when he acted under the will; it shows an offer to prove that the other parties were conversant with the facts, and it conclusively shows that the caveator acted in ignorance of not only facts, but of all his rights, and at no time did he perform any act with the intention that the other parties should act upon his conduct; the record, on its face, further shows that the caveatees have not done any act that is in any way prejudicial to themselves by reason of the fact that the caveator took, through ignorance, and fraud practiced upon him, certain property under the will.

In Fisher et al. *vs.* Boyce, 81 Md. 46, the court says:

> "A party can not, either in the course of litigation or in dealings in pais, occupy inconsistent posistions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party *done with the knowledge of his rights and of the facts*, determines his election and works an estoppel. It is an old rule of equity that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right

or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will (Bigelow on Estoppel, 562).

"*If, however, a party has acted in ignorance of the true state of facts, he will not, on discovering the truth, be bound by his previous conduct, based upon a state of case essentially different from that which had controlled or influenced his prior action.* In the case under consideration, the record does not show that the appellees, since the will and codicil were admitted to probate, have obtained knowledge of facts previously unknown to them; in fact, have, since the institution of these proceedings, ascertained that the testator was, by fraud or undue influence, induced to execute said papers as testamentary dispositions of his property. It is a maxim in a court of equity not to permit the same person to hold under and against a will. This rule does not, of course, apply to cases as hereinbefore explained, where the party objecting to the will has previously assented thereto without knowledge of the circumstances attending the execution of the will."

In re Miller's Estate, 159 Pa., p. 562, the court, in substance, say:

"The remaining question is over the effect of a receipt by the appellant of some small sums of money paid to him by the executors in compliance with the directions of the will. Is he estopped by the receipt of his money? The general rule is that one who accepts a benefit under a will can not deny the validity of that instrument; he can not affirm the will so far as it is beneficial to himself and deny its validity as to others who are named as beneficiaries (Zimmerman *vs.* Lebo, 151 Pa. 345). But an election in pais to take under a will should be intelligently made and should be unambiguous and positive in its character to amount to an estoppel (Dickinson *vs.* Dickinson, 61 Pa. 401).

"Whether the receipt of money by a legatee claiming to be entitled to receive it, and much more, as an

> heir at law, can be treated as an election to affirm the will, is, to say the least, very doubtful; but if, for the purpose of this case, we leave the conclusion reached by the court below on this question undisturbed, we do not think that the conduct of the appellant is of such a character as to amount to an irrevocable election to take under the will."

The rule seems to be that a legatee who has received his legacy, and afterwards concludes to contest the will, may return the legacy to the executors, and so relieve himself from the operations of the general rule that forbids him to take under the will that which the testator gave him, and at the same time deny its validity as to others.

Speaking of election, the court say:

> "Such election to be binding must be evidenced by unequivocal acts clearly proved, must be made with the full knowledge of the facts; and the burden of showing this is upon him who alleges that an election has been made. It would seem to be a fair deduction from our cases, that where the acts set up are equivocal, or were done in ignorance of the rights of the doer, or where they consist merely in the receipt of a pecuniary legacy and the money is returned before the appellant proceeds beyond the entry of his appeal, they will not amount to an estoppel."

In the above case the appellant was the son and heir of Alexander H. Miller, who left an estate of about one-half a million dollars, and he gave the bulk of the estate to one of his sons and made him executor. The appellant came into the Orphans' Court and by petition asked leave to appeal from the decree admitting the will to probate and asked for the issue of devisavit vel non. He alleged mental incapacity of the testator to make the will and undue influence; and citation was issued and appellant began to take his testimony, and while these proceedings were in progress

the executors moved to dismiss for the reasons set up in their answer. The executors contended that the appellant was estopped from contesting his father's will because his brother had presented a similar petition and it had been dismissed, and that the appellant had been examined as a witness; and, secondly, that having received some small sums from the executors, which the testator had directed should be paid to him, he had affirmed the will and was estopped for that reason also from contesting it.

In the case of Medill et al *vs.* Snyder et al., 61 Kan. 15, the issues were in substance the same as in the case at bar, the issue of estoppel being put in somewhat different words, as follows:

> "When the plaintiff, Nana Medill, received property and money from her father's estate under the provisions of the will and codicil in question in this cause, did she do so in ignorance of her rights and without having knowledge of or being advised of the facts urged by her as grounds for setting aside the said will and codicil?"

The first point contended for was that the caveator, having received and retained property under the will, had recognized its validity and was estopped to deny it. The court say:

> "That is conceded to be the general doctrine, but it can have no application if she acted in ignorance of the facts and her rights in the premises. It is true she did not institute a contest until more than a year after her father's death, and that during that time she proceeded as though the will was valid, accepting and using the property and fund set apart for her as the will provided. Her testimony tended to show, however, that she did not learn the important facts relied on to show testamentary incapacity nor what her rights were until about the time the action was begun. She was acquainted with some of the circumstances cited to show the unsoundness of mind, but there is testimony that many of the controlling facts, indicating incapacity, were unknown

> to her, and that she did not understand or learn that she could attack the will on such grounds until about the time the action was taken. As soon as she learned the facts and understood her rights, she challenged the validity of the will and tendered back what she had already received under the will. It would seem from the testimony that her conduct did not induce a change of position by Sherman Medill, nor operate as a fraud upon him, and it can not if all that she receieved under the will is restored to the estate."

The case of Lee *vs.* Templeton, 73 Indiana, 317, is a case identical with the case at bar, and in that case the court held that the caveators were not estopped from disputing the validity of the will from the fact that they attempted to assert its validity when they were ignorant of the facts surrounding the making of the will. The court, in that case, say:

> "But the estoppel is not created unless the acts or declarations constituting it are plainly inconsistent with the rights which they are alleged to have barred, and were made with full knowledge of its existence. . . . Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies.
>
> "An application of the doctrine thus laid down to the case before us shows that the paragraph in question was insufficient for the reason, if for no other, that it does not show that either the plaintiff or his wards, at the time of the proceedings in the partition suit, had any notice of the mental unsoundness of the testator, at the time of the execution of the will, and its consequent invalidity. Without such notice it is clear, on the authorities, and on general principles in respect to estoppels in pais, that the proceedings in partition can not estop the appellees, on behalf of his ward, to contest the validity of the will."

In the case of Fletcher *vs.* Holmes, 25 Indiana, 469, the Supreme Court of that State consider the doctrine of estoppel and hold that a person who acts in ignorance of the true facts can never be estopped by his conduct. The court say:

> "The doctrine of estoppel in pais rests upon a reasonable and just foundation. For the prevention of fraud the law will hold a party to be concluded by his own act or admission. Surely this can have no application where everything was equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the party seeking to conclude him was in no degree influenced by the acts or admission which are set up. Estoppel in pais, unlike technical estoppels by deed or matter of record, never exists without reference to the moral qualities of the conduct alleged."

In the case of Andrew *vs.* Lyons, 11 Allen, p. 350, the Supreme Court of the State of Massachusetts, in considering the question of estoppel, say:

> "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It was not quite properly so called, but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious and must be strictly made out. The parties setting up such a bar to the reception of the truth must show that there was a wilful intent to make him act on the faith of the representation, and that he did so act."

In Brant *vs.* Virginia Coal Co., 93 U. S., p. 335, the Supreme Court of the United States, speaking of the case before them, say:

> "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that

doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all of this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by the very learned judge that the cases on this subject go to this result only, that there must be positive fraud or negligence so gross as to amount to constructive fraud. . . . And it would seem that, to the enforcement of an estoppel of this character with respect to the title or property, such as would prevent a party from asserting his legal rights and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, must be clearly established. . . . It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In Henshaw *vs.* Bissell, 18 Wall. 271, the Supreme Court of the United States, speaking of estoppel, say:

"An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. *Conduct or declarations founded upon ignorance of one's rights,*

have no such ingredient and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights, but these are exceptional and do not affect the correctness of the general rule as stated."

In the case of Farmers, etc., Bank *vs.* Farwell, 19 U. S. App. 262, the U. S. Court of Appeals held that knowledge of the true facts was essential to work estoppel against a party.

In Halloran et al. *vs.* Halloran et al., 137 Ill., p. 112, speaking of an instruction in that case, the court says:

> "An acknowledgment by the complainants of the validity of a sale, and of the rights acquired by the purchaser thereunder, may or may not work an estoppel, according to the circumstances. It certainly would not *unless made with full knowledge of all the facts;* but such knowledge is not a part of the hypothesis of the instruction."

A party is not estopped by an admission made in ignorance of his rights induced by an innocent mistake of material facts.

Clinton *vs.* Haddan, 50 Conn. 84.

One of the strongest cases on this question of estoppel is that of Taylor *vs.* Cussan, 90 Va., p. 43, where the court quotes at length the definition of Judge Story, and also the five elements required by Mr. Bigelow in his definition.

See, also, Cumberland C. & I. Co. *vs.* Sherman, 20 Md. 117.

On the question of laches raised by the court below it is only necessary to say that in this case the caveator could, under the law, file his caveat or bring his action of ejectment at any time within twenty years from the death of

George W. Utermehle; that at the time that he filed his caveat to the will, as far as realty is concerned, *probate thereof had just been asked*, and that he could not have before this time questioned the will as a will of real property except by an action of ejectment.

In the case of Barbour *vs.* Moore, reported in 4 App. D. C. 535, the action of ejectment was not brought until nine years after the making of the will, and this was not considered laches.

The latest case and a most pertinent one on this question of laches is that of Magee *vs.* Welsh, 18 App. D. C., p. 177, where the Court of Appeals overruled a demurrer to a bill, which bill was filed June 23, 1900, to vacate a deed of real estate dated July 1, 1843 (over fifty-six years before), charging that the deed was fraudulently made by the ancestor of the complainants, the ancestor dying May 23, 1891. The bill averred the fact that the complainants only suspected the fraud within three years of the commencement of their suit, and had no actual proof of it until within one year. The court held that the parties were not guilty of laches.

In this case the caveator offers to show that George W. Utermehle was incapable of making a will at the time that he made the paper in question, and also that the paper was made under the undue influence of the caveatees; that plaintiff in error obtained no knowledge of this until some time early in the year 1900, when he immediately filed his caveat. It was suggested by the court that a different rule might apply on the ground that he had elected to take under the will, and should have inquired into the facts concerning the making of the will. This doctrine is unsound because the caveator is not here invoking the aid of the court to assist him in doing something which he may not have the right to do, but he is in court claiming his legal rights, and the caveatees are setting up as a defense the alleged estoppel; the caveator shows

conclusively on the record why he was unable to discover the facts before he did, and although the record shows that he was lulled to sleep by certain promises of the caveateas, still having brought his action within the time prescribed by the statute of limitations, it is immaterial, as far as this case is concerned, when he discovered the fraud, provided he did not do any act to ratify the will after such discovery.

In the case last referred to, the Court of Appeals say:

> "Moreover, if the right of the appellants to institute inquiry and to take action is to be dated from May 23, 1891, when Catherine Ann Whelan died, and their title accrued, *they would be far within the statutory period within which their title, if a legal one, could be enforced at common law, and within which, therefore, the doctrine of laches would enforce no bar in equity.* Furthermore, it is true that where there are distinct charges of fraud, and it appears that the suit has been instituted within a reasonable time after the discovery, laches will be no bar (Story's Equity Jurisdiction, section 1520; Michoud *vs.* Girod, 4 How. 503; Badger *vs.* Badger, 2 Wall, 87)."

Upon examination of authorities it will be found that where a person claims title to real property the doctrine of laches can never be invoked where a proceeding is taken within the statutory period.

It will, therefore, be seen, upon an examination of the authorities cited, that in order to estop the caveator by his acts it is absolutely necessary that he should be fully acquainted with all of the facts surrounding the making of the alleged will, and that if he were not so acquainted no action of his can in any way estop him, for there is wanting the knowledge primarily necessary to work an estoppel. He can not be held to be guilty of laches, for the authorities show conclusively that laches are never imputed to a person who has instituted his action within the statutory period, and should there be anything to determine in this connection it is necessarily a question of fact which must be dealt with

by a jury and not by a court. In the case of Pence *vs.* Langdon, 99 U. S. 578, the Supreme Court of the United States say:

> Acquiescences and waivers *are always questions of fact. There can be neither without knowledge.* The terms import this foundation for such action. *One can not waive or acquiesce in a wrong while ignorant that it has been committed.* Current suspicion and rumor are not enough; there must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable despatch. He can not rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind and must seek compensation in damages. *But the wrong-doer can not make extreme vigilance and promptitude conditions of rescision.* It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership and by which he has not been affected. *The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.* Again, in order to displace the title of a party to relief on the ground of his delay and acquiescence, *it lies upon the defendant by distinct and explicit evidence to bring to the plaintiff the knowledge of the fact on which the acquiescence is founded and to which he refers.*"

It is thus seen that acquiescences and waivers are questions of fact, and so, also, is the question of estoppel, yet in this case it is contended by defendants in error that, taking all of the facts as set out in the bill of exceptions, the plaintiff in error is estopped. In order to establish any such contention, it is absolutely necessary for the court to undertake to weigh, throw out, or disbelieve the testimony of the plaintiff in error himself, for he testifies when he first acquired knowledge of the facts surrounding the making of his grand-

father's will, and states that up to that time he had no knowledge of the undue influence exercised over his grandfather. How, then, can the court say in this case that the plaintiff in error had knowledge when he, himself, denies that he had knowledge of the facts as well as knowledge of the law? In other words, the court below by its ruling says: Although upon a motion to instruct the jury all of the facts must be conceded, still when determining this question, I find that the plaintiff in error, caveator, did not state the truth when he said that he had no knowledge either of facts or law. Every inference that may be drawn from the testimony in his favor, according to the authorities, is to be given to a party in deciding the question whether or not the jury shall be instructed to return a verdict against him, and still the court in this case disregards that principle of law and refuses to give the testimony of plaintiff in error the consideration that he is entitled to have given to it.

It is therefore respectfully insisted that as the plaintiff in error was ignorant of the facts surrounding the making of the will, the court had no right to arbitrarily find otherwise; that the whole question was one which should have been submitted to the jury upon proper instructions, and the jury should have been permitted to say, upon all the evidence, whether or not the plaintiff in error was estopped. In other words, after the caveator had given his testimony on the question of estoppel, as well as on the other questions involved in this case, the defendants in error should have given their testimony and the jury should have determined, from all the facts the question of estoppel, as well as the other questions involved in the case, and in determining the question of estoppel the authorities hold that the burden is on the person setting up the estoppel to show its existence. It is in the nature of an affirmative plea setting up affirmative facts, which facts must be proved by the party alleging them.

Proposition III—Ignorance of Law.

It is contended that if the caveator acted in ignorance of his legal rights or was wanting in knowledge of the rule which compelled him to elect, his acts under such circumstances did not constitute an estoppel. This question is raised in the record not only upon exception to the ruling of the court in its instructions to the jury, but upon the ruling of the court as to the admissibility of certain questions put to the caveator as to his knowledge of his legal rights and as to his knowledge of the rule which compelled him to elect. The rule of law that estops a party from setting up the truth, being a harsh rule, is necessarily strictly construed, and the authorities hold that conduct or declarations founded upon ignorance of one's rights do not estop a person. In Henshaw *vs.* Bissell, 18 Wall. 271, the Supreme Court of the United States, speaking of estoppel, say: "Conduct or declarations founded upon ignorance of one's rights have no such ingredient and seldom work any such result." In the case of Medill et al. *vs.* Snyder et al., before referred to, the very issue of estoppel in that case involved the question of whether or not the caveator took under the provisions of the will in ignorance of her rights. The leading case on this question is that of Watson et al. *vs.* Watson, 128 Mass. 152.

That court, speaking in the case where a legatee had returned a legacy on the ground that he was ignorant of the rule of law that compelled him to elect, and also speaking of estoppel, say:

> "But the doctrine, whether applied in practice on the common law or on the equity side of the court, depends, not upon the technical rules, but upon principles of equity and justice and upon actual intention. An election made in ignorance of material facts is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the fact, has acted

> in misapprehension of his legal rights and in ignorance of his obligation to make an election, no intention to elect and consequently no election is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few."

Therefore the court came to the conclusion that a person accepting and holding a beneficial interest under a will can not, either in equity or law, assert an independent title in other property against the will, but that, after having received a legacy in ignorance of this rule, he may, upon being informed of the rule, return the legacy to the executor and give him notice that he elects not to take it, and the rule will not apply.

See, also, Spread *vs.* Morgan, 11 H. L. 587.
Wheeler *vs.* Smith, 9 How. 55.
Sparlook *vs.* Brown, 91 Tenn. 261.
Williams *vs.* Williams, 63 Md. 371.

The case of Spread *vs.* Morgan, above cited, follows the reasoning of the Massachusetts case and has applied the same rule to the doctrine of election and estoppel, the two courts, i. e., the House of Lords and the Supreme Court of the State of Massachusetts, hold that a party must have knowledge, not only of facts but also of his legal rights, and as is said in both of these cases, it is necessary that a party have *knowledge of the law in order to make an election binding upon a person making it.*

It is therefore contended that not only was the evidence offered as to the caveator's knowledge or want of knowledge of his legal rights and the doctrine of election, admissible, but that the court erred in instructing the jury to return a verdict for the caveatees in the very teeth of such evidence, for if, as contended by the caveator, such testimony was admissible, then it was absolutely impossible to invoke the doctrine of estoppel as matter of law against the caveator,

for the record conclusively shows that he had no knowledge whatever of the existence of this doctrine at the time that he took the bequest and devise under the will, and not having knowledge of the doctrine and such knowledge being essential according to the authorities to work an estoppel, it was error in the court to hold that the caveator was estopped. Now, contending as we do, on account of his ignorance of *facts* and of his *legal rights* that the caveator was not estopped by reason of the fact that he received certain devises and bequests under the will of his grandfather, we come to consider the fourth proposition.

Proposition IV—Tender.

'In considering the fourth proposition it is necessary for us to consider what action should have been taken by the plaintiff in error (caveator) as soon as he discovered the facts concerning the making of the alleged will and was informed of his legal rights. In other words, how should he repudiate his former acts? Did the circumstances of this case as set out in the record compel the caveator to return not only the benefits received under his grandfather's will, but also those received under the will of his grandmother, before the filing of the several caveats when there was, at the time, no personal representative to receive the benefits if an offer were made to return them, and when, without any regard to the decision of the issues in this case, the caveator would be entitled to receive more property than he had already received; and when, after an offer to return and account, he, the caveator, immediately received notice from the solicitors for the caveatees that they would give up nothing unless compelled to do so in court, the caveatees thereupon immediately filing a petition in the office of the Probate Court, asking that the will be probated as a will of real property. Under these circumstances the final question to decide in determining the

right of the caveator to contest this will is whether or not he was compelled to make any tender whatever, and further, whether or not the tender and offer made before the caveat was filed and by him in his pleadings set forth was not a sufficient repudiation of his rights under the alleged will of his grandfather, which placed him in the position where he could contest the validity of the alleged will.

Before considering what the law requires the caveator to do, it is necessary to consider exactly what he did. According to the testimony, when he learned of his rights in the matter, as well as of the facts surrounding the making of the alleged will, he made a tender in writing to the caveatees of all benefits that he had received under the will of George W. Utermehle, and he was, at the time, according to the testimony, able to carry out the offers made in the several letters to the caveatees; he had sufficient money to tender to them, and he had an option on the property which he had received under the will and which he had sold prior to discovering the facts surrounding the execution of the will. At the time the letters were written, and after that time, he was able and ready to make good the tender. No further steps were taken on account of the fact that a day or two after the letters were written his attorneys were informed that the caveatees would accept nothing; they would fight and would not receive or give anything unless compelled to do so. Immediately thereafter they filed a petition in the Orphans' Court, asking that the will be admitted to probate. The testimony further shows that George W. Utermehle left no other will than that here in controversy and that if he had died intestate caveator would have been entitled to one-third of his real property; that his real property was valued at about one million dollars and was left, with the exception of one piece, to the caveatees, and that the caveatees substantially hold all the property at the present time, save that the caveatee, Mrs. Norment, transferred without consideration a

large portion of her share to her children, retaining, however, more than one hundred thousand dollars worth of real estate the title to which was derived by her under the alleged will.

The evidence in the case further shows that the caveatees and caveator each received one-third of the property under the will of Mrs. Utermehle, as if Mrs Utermehle had died intestate, and that in his pleadings the caveator offers to account for everything that he received under that will. It is therefore insisted that the caveator did everything possible to put the parties in statu quo, which is all that is necessary to give him a proper standing in court.

He is not in the position of saying:

> "I have certain property which I intend to keep and which I derived under and by virtue of certain instruments, but I intend to destroy the effect of these instruments."

In this position he would have no standing, because the record would show that he elected to hold his property by virtue of the instrument that he was attempting to destroy, but he says:

> "I have certain property in my possession which I am ready and willing to give up and to account for; you have a large amount of property in your possession belonging to me; the instrument under which I received my property is void and I do not claim to hold it under that instrument, but am ready and willing to account to you and insist that you give me my share without any regard to the instrument."

The party making such a statement does not stand in any inconsistent position, and places the other parties in such a position that they will lose nothing by reason of the fact of his having received certain property in ignorance.

What Tender Was Necessary?

In considering in this connection the propositions of law that arise from the facts in the record, we will first ask whether or not, on account of the condition of the property, it was necessary for the caveator to make any tender other than an offer on his part to account for anything that he received from the estate of George W. Utermehle. And, secondly, whether or not it was necessary for him to do anything more than he did on account not only of the condition of the property, but on account also of the action of the caveatees?

Before considering the first proposition, it is necessary to state that the letters sent and the pleadings in this case aver a readiness and willingness on the part of the caveator to account to the caveatees for all of the property that came into his hands, and which at one time or another belonged to George W. Utermehle.

While the caveator has in his pleadings offered to account for all the property he received from his grandmother, it is only necessary to say that both he and the caveatees took equal portions of that property and the same portions that they would have taken if there had been no will either of the grandfather or grandmother, so that the offer to account for that is merely stated to show, if it be necessary, that caveator is ready to treat that property as if there had been no will.

First. Was it necessary for the caveator, on account of the condition of the property, to make any tender other than an offer on his part to acoount? In other words, was caveator compelled in this case to offer restitution, or make restitution, to the caveatees when they, the caveatees, had in their possession property which would belong to himself if the will were not broken and for which he was willing to account to the caveatees if the will were broken?

Here it becomes necessary to consider the origin of the rule of estoppel or election that is applicable in a case of this

character. The rule is not one that is applicable to wills merely, but it applies to all classes of instruments and all situations of parties. The law will not permit a person to maintain an inconsistent position, and when a person has acted under an instrument, through ignorance, he must, as soon as he discovers the true facts, repudiate the instrument and, as far as possible, place the parties in the same situation they were in prior to the making of the instrument, and, therefore, when a person has received a benefit under a will and afterwards claims the right to attack that instrument, he can not at the same time claim to hold what he has received by virtue of the instrument; in other words, he must elect. Election does not require, however, in all cases a surrender, nor does it work a forfeiture; it is not an unbending rule; it is a rule that springs from manifest principles of equity, intending to do justice to all parties concerned. It is well settled that the doctrine of election is as well satisfied by compensation as by forfeiture. In that way justice is done to all. Thus, a disappointed legatee may say to the devisee:

> "You are not allowed by a court of equity to take from this estate that which you would otherwise be entitled to until you have made good unto me the benefit the testator intended for me."
>
> Farmington Savings Bank *vs.* Curran 72, Conn. 349.

And, as before stated, this rule of election or estoppel is not confined to wills. Lord Redesdale held that this rule of election was applicable to every species of instruments, whether deed, will, or other writing, and that the rule could be applied in a court of law as well as a court of equity. Thus, this rule is applied, by the Supreme Court of the United States, in the case of Rabb *vs.* Voss, 155 U. S., 13, in a case at law, and also by the court in the case of Smith *vs.* Gilmore, 7 App. D. C. 192. Those authorities lay down

the proposition that a person can not at the same time hold inconsistent positions; he can not contend for something and at the same time try to repudiate the ground upon which he bases his contentions. Upon an examination of the authorities, it will be found that there is no case where a court has decided that a caveator, an heir, must turn over property to caveatees, other heirs, they also having property from the ancestor, when the heir, the caveator, intends to contest the will; all the courts have decided is this: that a legatee must tender to the executor the legacy received before he can contest the will, and that a devisee must make an offer of tender in his bill for partition of the estate with the other heirs, for nothing is clearer or more certain than the only thing that a party is required to do is substantial justice, and a party can not claim benefits or emoluments by virtue of a will, deed, or other contract and then attempt to gain other benefits by repudiating the will, deed or contract. But there is no rule of law that requires a party to give up that which he can rightfully keep without injuring any one to some person who is not entitled, as a matter of justice and equity, to receive the same.

While we can find authorities without number which speak of the return of the consideration, the restitution of a legacy, still, upon an examination of them, we will find that in those cases there was no contention raised as to whether or not the consideration must be actually returned or the legacy restored.

In the case of In re Peaslee's Will, 25 N. Y. Supp. 940, an attempt was made to contest a will without making a tender or an offer to tender the legacy received under the will. The court adopted the general principle of law and stated that it is a well-settled proposition that a person who accepts or retains a benefit under an instrument, whether deed, will, or other writing, is held to have adopted the whole and to have renounced every right inconsistent with it. In that case the appellant urged that the reason

for the rule did not apply, because no injury could result to the executor, for if the will were broken the caveator would be entitled to receive a larger sum of money, and, therefore, that the executors were amply protected. The court, however, say :

> "It may be true that if the contest should proceed it would so turn out, but of that we are not sure. It does not appear that should the petitioner be successful in her contest as a result, *her mother's intestacy* will be established. There may be other and prior wills in existence, the validity of one of which may be established with the possible result that the petitioner will not receive thereunder a legacy sufficient in amount to make good the advance to her by these executors; certainly the contrary can not be safely assumed. The fact that the petitioner received this money and expended it before becoming aware of the fact, which encouraged her to enter upon a contest of the will may, perhaps, be unfortunate for her. If misfortune it be, it arises, of course, from the necessities which induced her to expend the money. Where a person asks that the rule be not applied on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the fact which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the result may be, no one can be the loser because of the payments originally made to her, she is not in a situation to attack a will."

In this case we have shown that there is no executor who could receive this money; that the caveatees have received some hundreds of thousands of dollars more than the caveator; that there is no other will and that the caveator has made such tender and offer that the parties are put in a position where, whatever the result may be, none of the caveatees can in this case be the loser because of the payments originally made to the caveator, and, therefore, the

caveator, in this case, comes within the exception laid down in the New York case. The caveatees in this case are charged with fraudulently using undue influence in obtaining this will. In considering the question of attempting to place parties in their original position where a bill was filed to vacate a conveyance on the ground of fraud, the Supreme Court of the United States, in Neblett *vs.* McFarland, 92 U. S. 103, say:

> "In cases of this character the general principle is that he who seeks equity must do equity; that the party against whom relief is sought should be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction."

Further on the court, however, say:

> "Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the object of the special solicitude of the court; if they are caught in their own toils and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

It will be noticed that the authorities apply this rule of election or estoppel in the same manner to a deed, will, or other writing.

In the case of Judge of Probate *vs.* Stone, 44 N. H. 593, A, by fraud, obtained an assignment from B of all his interests in a large estate, of which A was administrator, A paying $4,000 therefor. B, without discovering the fraud, spent all of the money and thereafter died. His administrator, upon discovery of the fraud, rescinded the contract, and at that time A had in his hands a large amount of money, as administrator, more than four thousand dollars of which would have belonged to B had

B not assigned his interest. The court held that the administrator of B had a right to rescind the contract and bring suit for the money without paying back or offering to pay back the $4,000, leaving A to deduct the amount paid to B for the assignment from the moneys he had in his hands belonging to B.

In speaking of the question, the court say:

> "Either Cooper (B) or his administrator might on the discovery of fraud rescind the contract, but it must be rescinded immediately upon such discovery. If Cooper (B) did not discover it in his lifetime, then his administrator, upon such discovery, might rescind or ratify. He could not do both; and if he elected to rescind he could only do so by placing the defendant in the same position in which he was before the assignment was made; but the defendant can not complain if he obtained the deed by fraud and then kept the said Cooper (B) in ignorance of it until he had expended all of the money he had received and then died, and an amount of money belonging to the estate of the said Cooper (B) had come into the administrator's hands larger than the amount he had so paid."

The court held that the administrator, when sued by the administrator of B, had a right to reserve or have deducted from the sum due the administrator of B the amount of $4,000. The court held, however, that if the administrator of B, when he made demand and brought his suit, intended to make the defendant pay over the whole amount of money in his hands, without either paying him or allowing him to deduct the $4,000, then there was no rescision of the contract, and the administrator of B could not maintain his suit.

In Medill et al. *vs.* Snyder et al., 61 Kan. 15, the court, after considering the facts, say:

> "As soon as she (the petitioner) learned the facts and understood her rights, she challenged the validity of the will and tendered back what she had

> already received under it. It would seem from her testimony that her conduct did not induce a change of position by Sherman Medill, nor operate as a fraud upon him; and it can not, if all that she received under the will is restored to the estate."

The court again say:

> "Here the legatee who accepted the benefits has offered to restore what was received, and, as we have seen, no one can be prejudiced or be the loser by her conduct."

The court, considering the offer of restoration, as set out in the petition, say: "The offer of restoration, made by Nana Medill, in her pleading, was sufficient in a case of this character." And in support of that statement is quoted the case of Thayer *vs.* Knote, 59 Kan. 181, in which case the court considers the general rule necessary for the rescision of a contract, which is to make a return or tender of what a party has received. The court, speaking generally of the offer to restore all received under the contract, say:

> "The plaintiff in error offered to restore the consideration paid for the instrument of the assignment and interest on the same. Objection is made that this offer should have preceded the bringing of the suit. It is usual in such cases to make the necessary tender before the institution of the proceeding, but equity will not refuse relief because it was not then done; equity only requires a suitor to do equity, not necessarily in the first instance, except in his bill to offer to do it."

In the case of Wheeler *vs.* Smith et al., 9 How. 55, a bill was filed to set aside a release made by the complainant. The case was heard on bill and demurrer. It appears from the allegations in the bill that the complainant had received a large sum of money and had released his rights in the estate of Charles Bennett, he being paid for such release the sum of $25,000. The bill alleges the willingness

to account for the money already received, and further asks that the trustees pay to him the whole amount coming to him from the estate of Charles Bennett. The court sustained the bill and held that the complainant was ignorant of his rights at the time he made the release, and therefore the same could be set aside. There was no attempt to pay back the twenty-five thousand dollars before the filing of the bill, but there was a mere allegation in the bill, stating the willingness of the complainant to account.

Again, in the case of Montgomery *vs.* Pickering et al., 116 Mass. 227, in which a bill in equity was filed to compel the reconveyance of a parcel of land on the ground that the conveyance was obtained through fraud and mistake, the court, after holding the conveyance fraudulent and finding that the defendants had in their possession a sum of money belonging to the complainant, said:

> "Nor was there any necessity upon the facts disclosed for the plaintiff to restore, or offer to restore, the defendants to the position in which they were before the deed was executed. By the payment made to her upon the delivery of the deed, the plaintiff took nothing from the defendants that she was not entitled to receive, and there was nothing therefore on her part to be restored."

Mr. Bigelow, in his work on Fraud, page 424, says:

> "The right to insist upon tender is not an arbitrary right; on the contrary, it will yield to circumstances which show that it would be either unjust or idle to require it."

This would seem to decide the exact point here in controversy. Would it not be unjust to compel the caveator to hand over to the caveatees property which, without any regard to the decision in this case, belongs to the caveator? Would it not be an idle ceremony to require the caveator to hand over to the caveatees property, when they, the

caveatees, have in their possession hundreds of thousands of dollars that will, if the contention of the caveator is sustained, belong to him, and when they, the caveatees, could have no interest in the property now in the hands of the caveator, or property that he is supposed to have acquired under the will, other than a part interest for which the caveator is ready to account?

This right to bring suit before a rescision of the contract and tendering back of money received was considered by the Court of Appeals in Howard *vs.* The Railroad Co., 14 App. D. C. 297. In that case the court held that the tender of money at the trial table before the case went to the jury was a sufficient tender upon the rescision of a release obtained by fraud. The court said:

> "The rule that one who seeks to avoid on the ground of fraud a release of a claim of damages for personal injuries must return the amount received under it, is satisfied by the tender of the money on the trial before the case is finally submitted to the jury."

In Lyon *vs.* Allen, 11 App. D. C. 549, the Court of Appeals held that a tender was absolutely necessary. They say:

> "It is no answer to the objection that the money has not been returned nor offered to be returned; that the amount received by the plaintiff under the release has been discounted from the verdict. Suppose the verdict had been found for the defendants because of insufficient proof of negligence on their part or because of contributory negligence on the part of the plaintiff. What would have been the predicament of the defendants in respect to the money paid under the release? Clearly they would have no recourse to recover it back from the plaintiff. The plaintiff can not be allowed both to affirm and disaffirm according as the case may terminate. He can not affirm for what he has received and disaffirm

> and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict. He must disaffirm and rescind the release in toto if the facts justify him in doing so, and return or offer to return what he has received under it before bringing his action."

This decision of the Court of Appeals would seem to be at variance with the decision of the Supreme Court of the United States in the case of the Union Pacific Railroad Company *vs.* Harris, 158 U. S. 326, where the Supreme Court of the United States permitted the jury to deduct from the amount they should find for the plaintiff the amount paid for the release signed by the plaintiff, provided, of course, the release was obtained through fraud. The Supreme Court considered the settlement made by the parties a legal adjustment of their rights if the settlement or agreement was valid, and, if not, that then the money paid for it was the money of the defendant and should be deducted from the verdict. The rule here laid down clearly sustains the contention of the caveator. If the property received by the caveator would not, under any circumstances, belong to him, then, according to the decision of the Court of Appeals, he should tender it back; but, taking the reasoning of the Court of Appeals and applying it to this case, the caveator would be permitted to disaffirm the contract without tendering or offering back what he had received, because in a proper settlement of the case the caveatees would be entitled to have what he received charged up against him, and, if the caveator lost, the caveatees would have no interest whatever in the property in the possession of the caveator; and, taking the decision of the Supreme Court of the United States and applying it to this case, the caveator could repudiate the will and in the final settlement between the parties have what interest of theirs he received charged against him.

The decision of the Supreme Court of the United States is supported by the following authorities:

Girard *vs.* Carr Co., 123 Mo. 358.
Westlake *vs.* St. Louis, 77 Mo. 47.
O'Donnell *vs.* Clinton, 145 Mass. 461.
Smith *vs.* Holyoke, 112 Mass. 517.
Mullen *vs.* Old Colony R. R. Co., 127 Mass. 86.

It might be well here to review a few of the cases where the courts have required a repayment of the legacy. In the case of Hamblett *vs.* Hamblett, 6 N. H. 333, the court granted a motion made by an executor to compel the party contesting a will to pay the money, received by him as a legacy, into court. The court say:

> "*The security of the executor may require this*, and if the party can withhold it, he might, at one and the same time, treat the will as valid as to that portion of the estate to which he would be entitled under it and invalid as to the other property. In ordinary cases, therefore, where a party seeks to repudiate a will, as insufficient, he must do so wholly and entirely by refusing until it has been established to receive the benefits of it, or, if anything has been received, by returning it to the executor or placing it in the custody of the court, that the executor may have it in case the judgment may be against the validity of the will."

In Holt *vs.* Rice, admr., 54 N. H., 398, the Court made an order of the same nature.

In Miller's Estate, 159 Penn. State, 562, the court lays down the general proposition that one who accepts a benefit under a will is estopped from attacking its validity; that such party can not confirm the will so far as it is beneficial

to himself and deny its validity as to others who are named as beneficiaries. The court, however, say:

> "*Whether the receipt of money by the legatee, claiming to be entitled to receive it, will be treated as an election to confirm the will, is, to say the least, very doubtful.*"

In Fisher *vs.* Boice, 81 Md. 46, the court adopts the general rule and says that a person who does not elect with knowledge of all the facts does not come within the general rule.

In Madison et al. *vs.* Lamon et al., 170 Ill. 82, one of the few cases in which this question of estoppel arises between heirs, the court held that certain of the complainants could not maintain a bill for partition because they were beneficiaries under the will that they were attempting to attack. The court say: "They could not take, under the will, as devisees and then contest it as heirs at law." There was in this case, however, no offer on the part of the complainants to account for what they had received under the will or to repudiate the bequest to them under the will.

In re Soule's Will, 3 N. Y. Sup. 29, the court held a tender made of money received for a legacy during the trial of the case, insufficient. Upon an examination of that case it will appear that there was, first, a dispute about the probate, which was compromised, and payments were made under the compromise, and, that afterwards, without alleging any fraud, mistake, or ignorance, a caveat was filed. The court, in its opinion, treats the tender in that case as coming under the ordinary law of tender, and does not attempt to draw any distinction between a tender in a case of this kind and in any other suit.

In the case of Chipman et al. *vs.* Montgomery et al., 63 N. Y. 228, the action was in the nature of a proceeding for the construction of a will. Certain parties sought to overthrow the will and claimed the property as though the maker thereof died intestate. The court, while laying down the general rule, speak of the return of all that has been

received by legatees, but, while doing that, they use the following language:

> "A person can not accept and reject the same instrument. Courts of equity proceed upon a theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the same in all its provisions and renounce every right inconsistent therewith."

It will thus be seen, from these authorities that a tender is not necessarily a condition precedent to a proceeding to rescind or annul a will, deed, or other writing, but that the whole and only object of the tender is to place the parties in such a position that no one will be injured; and that where a person repudiates an instrument he may offer in his pleadings to restore that which he has when such offer places the parties substantially in the same position that they would be in if the instrument had never been executed.

Second. Was it necessary for the caveator to do anything more than he did, not only on account of the condition of the property, but on account also of the action of the caveatees?

We have considered generally whether or not a tender was necessary on account of the condition of the property and the manner in which it is held by the caveatees, and we come now to ask whether or not, in view of that condition, the action of the caveatees was not such as to waive all right to a tender. They had what caveator wanted; caveator had very little that they were entitled to, which very little they did not want; caveator offered to account; caveatees never answered the letters; caveator was ready and willing to tender; caveatees, according to the record, were ready to fight, and caveator was informed of that readiness. Should caveator, under circumstances of this kind, have attempted to further communicate with the caveatees and have done that which would have been a vain and useless act?

As said by Mr. Bigelow, p. 424, before quoted:

> "The right to insist on a tender is not an arbitrary right; on the contrary, it will yield to circumstances which show that it would be either unjust or idle to require it."

Again, where the defendant refuses, when a person offers to tender money, to receive the money, it is not necessary that the money should be actually produced.

> Barker *vs.* Parkinhorn, 2 Wash. C. C. 144.
> Hazzard *vs.* Barnabas, 10 Cush. 67.

The above case was a tender at law which was, under the rules of common law, somewhat technical. If the suit were a proceeding in equity to avoid an instrument, it would not be necessary that a good tender, such as required by law, should be made, for no such tender is required in a court of equity.

> Parkington et al. *vs.* Turvis, 128 Ind. 186.
> Shuee *vs.* Shuee, 100 Ind. 477.

Again, where a party to a contract where specific performance is sought refuses the performance and insists that he is not bound by the contract, no tender of the purchase money need be made before bringing the suit. The court say:

> "We do not understand that a court of equity, even in the first instance, requires the tender of money to be made when, from the facts and circumstances of the cause, it is apparent that a tender would be useless, and the receipt of the money refused by the opposite party. In this case the appellant has from the outset resisted a performance of the contract and insisted that it was not binding upon him. Any tender to him, while occupying this ground of defense, would have been an idle ceremony. He would have nothing to do with the money and he would not have compromised his

rights by receiving it. This must be obvious to everyone."

Wright *vs.* Young, 70 Am. Decisions, 453.
Hazzard *vs.* Loring, 10 Cush. 67.
Dorsey *vs.* Barbee, 12 Am. Dec. 296.

Again, the law never requires a person to do a useless thing; and, applying this principle, we are of the opinion that the absolute and unqualified refusal of a defendant to accept an assignment relieves the plaintiff of the duty of making a formal tender of a written transfer. What good could have resulted from it?

McDonald *vs.* Wolf, 40 Mo. App. 308.

Speaking of the tender that is necessary to be made in order to entitle a vendor to rescind a contract and recover the purchase money, the Supreme Court of the United States, after considering certain authorities on that question, say:

"From these authorities it may be laid down as a settled rule of law that to entitle a vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified, and this averment must be sustained by the proofs unless the tender has been waived by the purchaser."

Bank of Columbia *vs.* Hagner, 1 Pet. 467.

Again, speaking of this question, in the case of Chaney *vs.* Libby, 134 U. S. 81, the Supreme Court say:

"Indeed, after the surrender by Chaney in 1885 of the notes due in that and subsequent years, and his formal notification to Libby that he regarded the contract as forfeited and would not receive any money from him, Libby was not bound, as a condition precedent, to claim specific performance to go through the useless ceremony of tendering payment at the banking house, etc."

In Hunter *vs.* Daniels, 4 Hare, 420, 433, it was said:

> "The only remaining point insisted upon was that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or, in fact, to call for the benefit of it; and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The general rule in equity certainly was not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been mere form and that the party to whom it was made would have refused to accept the money."

Again, in the case of Moore *vs.* Crawford, 130 U. S. 142, the Supreme Court, speaking of the facts in that case, say:

> "It is true there is no offer to pay the balance of the purchase money, *but the case shows that a tender would have been but an empty show*, and, as the court had it in its power to require payment of the $240 note, thus completing the performance by Monroe, and as it did this by its decree, the allegation would have been merely formal and became immaterial."

Thus, it will be seen from these authorities that a tender is never required where it would be a vain and useless thing, and it is insisted in this case that, there being no executor or administrator to act for all of the parties, it would have been an idle and vain thing to have gone to the caveatees and tendered to them either any real or personal property. The whole record shows conclusively that the caveatees would not have accepted any money or property if the same had been tendered to them, and, as far as the caveat and estoppel are applied to the real property, these caveatees, by the record, did, before any caveat was filed to the will as a will of real property, take affirmative action and ask this

court to probate that will, and, in their petition so asking, declare that caveator is estopped from attempting to prevent their action.

It is therefore insisted that the actions of the caveator, on account of his ignorance, could in no way estop him from contesting the validity of this alleged will, *and that immediately upon his discovering his rights and the facts surrounding the making of the alleged will, he did everything that the law required that he should do, in order to protect his rights.* He accepted no benefits or emoluments under the will after his discovery and he did everything that the law required him to do to repudiate his former conduct as far as the will was concerned. The court below should not have held that on the facts in this case the caveator was estopped, and it committed error in so holding and in peremptorily instructing the jury to return a verdict for the caveatees on this point. Upon an examinatton of the record it will show that the court not only instructed the jury on the issues of estoppel, but went further and instructed them to return a verdict for the caveatees on the other issues, because, as stated by the court in the record, the caveator had no right whatever to give testimony upon these other issues.

We have treated of this proposition in all its phases, although the Court of Appeals in its decision seems to have regarded the question of tender as immaterial. The conclusion of that court, in attempting to draw a distinction between estoppel and election, is hardly warranted by the authorities, for certainly the same rule applies so far as the question of fact and law is concerned, and the criticism of the Court of Appeals of the House of Lords' case and the Massachusetts case is certainly erroneous. The principle of law laid down in those cases is the principle of law that should be invoked here, and if that be so, then the judgment of the Court of Appeals is erroneous.

The attempt on the part of the court to say that the parties could not be placed in statu quo is hardly warranted by

the facts in the case. The fact that the personalty has been disposed of by one of the devisees under the will certainly can not affect the rights of the plaintiff in error. According to his testimony, which testimony is uncontradicted, he had no knowledge of the fraud perpetrated upon him at the time that the personalty was received by the devisee, and he was also ignorant of the fraud at the time that the devisee's personalty was divided under the will of the devisee, and the division was exactly the same as would have been made if there had been neither will of George W. Utermehle nor will of the wife, except that one-third thereof would have gone to the widow. While there are in the record declarations and statements of the parties who attempted to defraud the plaintiff in error, it can hardly be said from the whole evidence in this case that the widow, who took all of the personalty under the will, gave to persons other than her children more than one-third thereof.

It is respectfully submitted that the conclusion arrived at by the Court of Appeals on this question of estoppel is not warranted by the facts in this case nor the law applied to those facts.

Testamentary Declarations.

We next come to consider those assignments of error which set up the refusal of the court to admit certain testimony offered by the caveator. This testimony embraces declarations made by the testator not only some years prior to the making of the alleged will, but down to as late as 1886, a year prior to the making of the alleged will. These declarations were offered to show not only the relationship that existed between the caveator and the devisor, but also the testamentary disposition of the testator as long as his mind was free and untrammeled and not interfered with by undue influence nor clouded by insanity.

The ruling of the court on these questions appears in the record on pages 53 to 56, both inclusive, and involves the

question whether or not testamentary declarations of a devisor are admissible where the issues concern insanity and undue influence. It was contended on behalf of the defendants in error that these declarations come within the ruling of the Supreme Court of the United States in the case of Throckmorton *vs.* Holt, 180 U. S., page 552. In that case the issues involved were forgery and revocation, and the Supreme Court of the United States held that on these issues parol evidence was not admissible, because they could throw no light at all on either issue. The court does go further and intimates that parol evidence is admissible in a case where the issue is insanity, but does not touch upon the question of undue influence. The court, after considering a great number of authorities, say: After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being unsworn declarations, and when no part of the res gestae are not within any of the recognized exceptions admitting the evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not part of the res gestae, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible

on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they can not be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person to the state of his affections when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the same individual, and his declarations are admitted, *not* as any evidence to their truth, but only because he made them and that it is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false can not be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

Thus it is said in Shailer *vs.* Bumstead, 99 Mass. 112, which is one of the cases cited in the margin in class A:

> "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. *The truth or falsity of the statement is of no consequence.*"

The testatrix in the above case died in 1865 at the age of ninety-one, having executed a will in 1851, another in 1853 and a codicil thereto in 1857, and among other issues raised was one of the testamentary capacity. The declarations that were held admissible were only for the purpose of showing "what manner of person she was" who uttered them. They were used to throw the light upon an alleged state of mind which was involuntary and the result of disease and old age. If used for any other purpose they were not admissible, said the court, because they were hearsay and could never be explained or contradicted by the person who uttered them.

The declarations offered in this case were offered for the purpose of showing at the particular time the feelings as expressed by words of the devisor towards the caveator.

It is respectfully submitted that the Supreme Court of the United States had not before it the question of either insanity or undue influence, or the question whether or not you can show the feelings that existed between a devisor and those who should be the object of his bounty, and that wherever issues are raised on these questions these declarations are admissible; for the purpose as far as the issue of insanity is concerned, of not only showing the present condition of the devisor's mind as to his capacity to make a will, but also showing his testamentary intention when he was sane as compared with his testamentary disposition of his property when it is alleged that he is insane, and on the

issue of undue influence, these declarations are admissible to show not only the feelings of the devisor towards the caveator at the particular time, but also to show the testamentary intention of the devisor as long as he was left to his own will and not influenced unduly by another.

In speaking of the admissibility of the declarations of the devisor, the Court of Appeals of Maryland, in the case of Moore *vs.* McDonald et al., 68 Md., where the issues involved were those of insanity and undue influence, say:

> "It has been argued that this promise to Sarah (alluding to a promise to take care of her and her child) having been made really twelve years before the execution of the will, could shed no light on the condition of the testator at the time of its execution; that if he then did intend to support these children, he may have changed his mind, and that even if his wife, or the caveatee, did object, it was merely a family dispute, etc."

In Griffith *vs.* Diffenderffer, 50 Md. 466, this court said:

> "The declarations of the testratrix as to her testamentary intentions, made some months before the execution of the will, were admissible. That such evidence might be offered either to rebut the charge of fraud and undue influence by showing that the will was consistent with the long cherished wishes of the testator, or that it was contrary to well settled convictions of what he thought was a just and proper disposition of his property. It is very clear from this that the declarations of the testator, made before the execution of his will, may be given in evidence by either caveator or caveatee—by the former in order to show that the will is not in accordance with his expressed wishes, and by the latter to show that it is. So in Davis *vs.* Calvert, 5 Gill and Johnson, 269, the court say that the incapacity of the testator may be established by proof of conversations or actions or declarations of the testator, or all of them taken together; also the contents of the will, the manner

of its execution, the nature and extent of the property of the testator; his family connections; their condition and relative situation to him; *the terms upon which he stood with them;* and the claims of particular individuals, are all proper to be shown to the jury upon the question of incapacity. Now, these declarations of the testator, made to his own daughter, and in reference to his grandchildren, certainly show the terms upon which he then stood to them, and that these terms were friendly. Such declarations and expressions, if made a short time before the execution of the will, would undoubtedly have been admissible. But there has not been and can not be any precise time before the execution of the will to which said declarations can be limited. If a testator changed his mind, from other cause than mental incapacity or undue influence, it could be shown by the caveatee. If from incapacity or undue influence, it is on the caveator to show it.

"In this last case inquiry as to the paternity of the childien was allowed to be gone into, which inquiry covered a period of fifteen years."

When it is charged that a will has been executed through undue influence, the declarations of the testator made before its execution are admissible by way of rebuttal to show his intention as to the disposition of his property, because a will made in conformity with such declarations is more likely to have been executed without undue influence than if its terms are contrary to such declarations.

In the case of In re estate of Goldthrop, 94 Iowa, the court held that declarations of testator, both both before and after the execution of the will, as to her feelings towards the contestant, her reasons for not recognizing him in the will, legatee's influence over him, and the disposition he desired to make, are admissible to show undue influence.

See, also, Harp *vs.* Parr, 16 Ill. 470.

Whitney *vs.* Wheeler, 116 Mass. 490.

In the case of Taylor et al. *vs.* Pegram et al., 151 Ill. 106, the court say: It seems that the testator had, before the execution of the present will, made two other wills, one in 1882 and one in 1886. One or two witnesses were questioned as to the testator's statements, made about the time of the execution of these former wills, upon the subject of the manner in which he had therein disposed of his property. It is admitted that the testator was of sound mind and free from the control of any undue influence when he made the former wills. The disposition which he stated in 1882 and in 1886 that he had then made of his property approximated very nearly to the provisions of the will now in contest. This circumstance tended to rebut the idea that undue influence had been exercised to procure the execution of the last will. In this respect, proof of the statements so made by the testator was not objectionable, even if it should be conceded that the time of their utterance was too remote from the time of the execution of the last will to justify their admission for the purpose of establishing mental capacity.

Again, testimony was admitted upon an issue of testamentary capacity, to show the testamentary intentions of the testator when he was of sound mind and memory, where he was suddenly prostrated with severe and fatal illness and during which he executed a codicil to his will. The court held it was proper to show the consistency of the will with the natural inclinations and previous declared intentions of the testator.

Hammond *vs.* Dyke, 42 Minn. 272.

It will thus be seen from these authorities that the declarations offered in evidence in this case tend to show the state of mind of the devisor at the time they were made, and were therefore admissible in evidence, and that the court committed error in refusing to permit such evidence to be offered.

Counsel for the defendants in error, in their brief in the Court of Appeals, contended that plaintiff in error was prohibited from filing his caveat on account of section 10 of the act of June 8, 1898 (30 Stat., p. 437), which said section is as follows:

> "SEC. 10. That the record in the office of the register of wills for the District of Columbia of a duly certified copy, or transcript of the record of proceedings, admitting any will or codicil to probate outside of the District of Columbia; and the record in said office of any will or codicil heretofore admitted to probate in said District, and which shall not have been annulled or declared void according to law prior to the passage of this act, shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act: *Provided*, That the provisions of this section shall not apply to any proceedings at law or in equity pending at the date of the passage of this act, or commenced within one year after the passage of this act, wherein or whereby the validity of such will or codicil is or shall be called in question."

An examination of this section will show that it does not apply to a direct attack on a will in the probate court, but was enacted for the purpose of preventing after a certain period an attack on wills in the equity and common law courts. This is fully demonstrated not only by an examination of the whole of said act of Congress, but by the wording of the section itself. The act of Congress here referred to provided in numerous sections for the reprobating of wills and codicils in the probate court, the probating thereof prior to said act not being sufficient to pass real estate. Section 10 was added thereto in order to prevent a collateral attack from being made on these old wills in the courts of common law and equity, and said section has nothing what-

ever to do with the probate court. The act, speaking of these old wills, says:

> "Shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act."

And in the proviso it is enacted that the section shall not apply to any proceedings at law or in equity pending at the date of this act or commenced within one year thereafter, and nothing whatever is said about the probate court. The statute is merely a statute regulating evidence in courts of law and equity; it was not in effect at the time of the trial of this case, being repealed by the Code. For these reasons and for the further reason that no action was ever taken thereon in the court below, it can not be considered as in any way affecting the rights of the plaintiff in error.

In view of the facts developed by the record, including the testimony given and offered, we respectfully submit that the Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia and that the justice of that court erred in directing the jury to return a verdict upon the issues of estoppel, and that he erred in directing the verdict upon the remaining issues, especially in the face of the direct testimony which was offered to prove the absolute mental unsoundness of the testator and the positive existence of undue influence in the procurement of the alleged will, and that error was also committed by the trial court in the rulings contained in this record in regard to the non-admission of testimony offered, and that for these reasons the decree rendered herein shoul be reversed and the cause remanded to the Court of Appeals, with direction to them to reverse their judgment and remand the cause for trial.

D. W. BAKER,
WILTON J. LAMBERT,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 329.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., AND MILDRED TAYLOR AND DOROTHY TAYLOR, INFANTS, BY LEROY M. TAYLOR, JR., THEIR GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

The defendants in error move the court to advance this case and set it down for hearing at an early day.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

To D. W. BAKER and JOHN C. GITTINGS, Esquires, *Attorneys for Plaintiff in Error:*

Please take notice that I shall submit the above motion to the court at the opening of the court on Tuesday, October 13, 1903, and that I shall at the same time submit to the court in writing the grounds upon which the motion is based, and certain affidavits, copies of all of which papers are hereto appended.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

Received copies of the foregoing motion and notice and of the papers referred to in said notice this — day of October, 1903.

D. W. BAKER,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error,*
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, JR., *Their Guardian ad Litem, Defendants in Error.* } No. 329.

I, Leroy M. Taylor, on oath state as follows:

I am one of the defendants in error in the above-entitled cause; Rose M. Taylor was my wife; the defendant Leroy M. Taylor, Jr., is my son, and the defendants in error Mildred Taylor and Dorothy Taylor are my grandchildren. When my wife's father, George W. Utermehle, died he was the owner of over one hundred and sixty-seven parcels of land situated in the District of Columbia, nearly all of which were improved. At the time of the filing of the caveat in this case seventy-nine of said parcels were owned by my wife, now deceased, and forty-seven were held by her sister, Mamie E. Norment, in her own right, and thirty-three were held by said Mamie E. Norment as trustee, and the remainder had been sold to various persons. ~~Among these sold was the property at the corner of Ninth and F streets, in the city of Washington, known as the Masonic temple.~~

LEROY M. TAYLOR.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 10th day of October, A. D. 1903.

W. MOSBY WILLIAMS,
Notary Public, D. C. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error*,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, JR., *Their Guardian ad Litem, Defendants in Error*. } No. 329.

I, Harry Norment, on oath, state as follows:

I am the son of Mamie E. Norment, one of the defendants in error in the above entitled case. I am 25 years of age, and for several years have been engaged in the real estate business in the District of Columbia. Of the real estate which my grandfather owned at the time of his death about eighty parcels went to my mother, and were, under some agreement between her and my father, Samuel Norment, who was her husband, conveyed to my father in fee-simple. My father died in the year 1891, and by the terms of his will and under a decree of the supreme court of the District of Columbia, sitting in equity in the case of Mamie E. Norment *vs.* Clarence F. Norment *et al.*, No. 13889, equity docket 33, which decree was made on the 23d day of February, 1895, the title to forty-seven of said parcels is now vested in my mother in her own right, and the title to thirty-three of said parcels is vested in her as trustee for the children of said Samuel Norment.

HARRY NORMENT.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 10th day of October, A. D. 1903.

ALBERT E. SHOEMAKER,
Notary Public, D. C. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error*, *vs.* MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, Jr., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, Jr., *Their Guardian ad Litem*, *Defendants in Error.*	No. 329.

BRIEF OF THE DEFENDANTS IN ERROR IN SUPPORT OF THE MOTION TO ADVANCE THE CASE.

STATEMENT OF THE CASE.

George W. Utermehle died in Washington April 16, 1889, owning real estate in this District of the value of about one million dollars and possessed also of a large personal estate. He left a widow, two daughters, Mamie E. Norment, wife of Samuel Norment, and Rose M. Taylor, wife of Dr. Leroy M. Taylor, and a grandson, Charles H. Utermehle. He left a will, by which, after giving $9,000.00 to certain relatives in Germany, he devised a certain promissory note for $750.00 and interest and real estate in Washington worth about $20,000.00 to his grandson, Charles. He gave to his wife all the rest of his personal property and devised to her the family residence in Washington. All the rest of his real estate he gave to his daughters, Mamie E. Norment and Rose M. Taylor, to be

equally divided between them. The will will be found in the printed record of the case, pages 116–117. Shortly after Utermehle's death his will was admitted to probate, his grandson, who was then twenty-three years of age, waiving citation and being present in court. By the will the widow was made executrix and she filed her final account in May, 1890. She died on March 13, 1893, leaving a will by which she divided her estate equally between her daughters, Mrs. Taylor and Mrs. Norment, and her grandson, Charles H. Utermehle. She appointed Mrs. Taylor and Mrs. Norment executrices. Her will was probated in March, 1893, Charles H. Utermehle, who was then twenty-seven years of age, again waiving citation as in the case of his grandfather's will. Charles H. Utermehle took possession of the house in Washington which was devised to him in his grandfather's will, collected the rents for a couple of years, and then sold the property for $20,000.00, received the proceeds of the sale and applied them to his own use. From his grandmother, during her life or after her death, under the terms of her will, he received over $100,000.00, all of which practically was part of the personal estate of George W. Utermehle, which he had bequeathed to his wife, and which she in turn divided between her children and her grandchild.

On the 9th day of June, 1900, Charles H. Utermehle filed in the supreme court of the District of Columbia, holding a probate term, a petition averring that George W. Utermehle at the time he executed his will was of unsound mind, and that the execution of the same had been procured by undue influence, fraud, and coercion (5). Mrs. Norment and Mrs. Taylor in July, 1900, filed an answer denying the averments of this petition and at the same time, pursuant to an act of Congress of June 8, 1898 (30 Stat., 436), asked to have the court admit the will to probate as a will of real estate (7, 11). In reply to this last-mentioned petition in September, 1900,

Charles H. Utermehle renewed the charges made in the caveat filed by him in June, 1900 (22).

Mrs. Taylor and Mrs. Norment not only denied the charges made by Charles H. Utermehle, but they set up in their pleadings that he was estopped to contest the will of his grandfather by having taken the real estate which was devised to him by that will and by having received also a sum of money in lieu of the note which was bequeathed to him under that will, and by having received from his grandmother during her life and after her death under her will various sums of money, part of the personal estate bequeathed to her by the will of George W. Utermehle, and by having participated in various ways in the settlement of the grandmother's estate under the provisions of her will.

The main reply of the caveator to the plea of estoppel was that a few days after his grandfather's death his grandmother (Mrs. Taylor and Mrs. Norment being present and acquiescing) had agreed that if he would not contest the grandfather's will his share of the estate would be equalized by the grandmother out of the personalty (22).

A question also arose in the case as to whether Charles H. Utermehle had relieved himself of the alleged estoppel by a certain written tender which he had made to Mrs. Norment and Mrs. Taylor shortly before he filed his caveat (30).

Issues were accordingly made up for submission to the jury of the questions of estoppel, mental incapacity, undue influence, fraud, and coercion (38, 39). Pending this Mrs. Taylor died, leaving a will which was admitted to probate and under the terms of which her husband, her son, and her grandchildren, defendants in error here, took her place in the litigation (33, 38).

The case was tried before Mr. Justice Barnard and a jury. The counsel for the caveator, Charles H. Utermehle, first offered their evidence bearing upon the issue of estoppel, and when they had closed their evidence upon that point the court instructed the jury to render a verdict in favor of the

will upon all the issues, on the ground that the caveator was estopped to contest the will (40). The opinion of the presiding justice is in the record (161).

The case was taken to the Court of Appeals of the District by the caveator on bill of exceptions and the ruling of the trial judge was there affirmed. (The opinion of the Court of Appeals will be found in the Washington Law Reporter, vol. 31, page 323. A copy of it is appended hereto.)

Charles H. Utermehle then brought the case to this court by writ of error.

The principal witness in the case was Charles H. Utermehle himself. In the course of his evidence he stated that the amount of personal property which Sarah Utermehle received under the bequest made by her husband, George W. Utermehle, of the bulk of his personal estate was in the neighborhood of $600,000.00 or $700,000.00 (100). Under a Maryland statute in force in the District of Columbia at that time a residuary legatee of the personal estate of a decedent might give bond for the payment of all debts and be relieved from filing any inventory or otherwise further accounting to the court. Mrs. Utermehle pursued this course, giving bond in the sum of $20,000.00 (3). She never rendered any account. Less than half of the personal estate was accounted for in this case. What had become of the remainder of it did not appear, except that Charles H. Utermehle averred in his pleadings that Mrs. Taylor, Dr. Taylor, her husband, and Mrs. Norment had secured large sums of money from the widow, and "that by reason of the drain upon the finances of said widow and bequests made by her to charity her large estate was reduced from about $600,000.00 or $700,000.00 in 1889 to less than $200,000.00 in 1893, exclusive of certain promissory notes made by her several heirs at law" (26). No evidence was offered tending to show that Mrs. Taylor, Dr. Taylor, or Mrs. Norment had received any money from the widow, except that on certain occasions she

gave equal sums to Mrs. Taylor, Mrs. Norment, and her grandson, Charles H. Utermehle.

There was put in evidence at the trial the record of a suit in equity in the supreme court of the District of Columbia, in which Mrs. Norment was the complainant, and the devisees, executors, and heirs of her deceased husband, Samuel Norment, were defendants. The suit was brought in April, 1892, shortly after the death of Samuel Norment. The bill charged that Samuel Norment had induced his wife to convey all the real estate which came to her from her father to her husband under a certain contract between him and her, which he had not carried out by his will. The result of the suit was a compromise decree, by which Mrs. Norment was given a part of the real estate in fee-simple, and the remainder went to his devisees, who were his children, some of it being held by Mrs. Norment for his minor children. (See the bill of complaint, p. 127, and the final decree, p. 156.)

Other pertinent facts in the case will be found stated in the opinion of the Court of Appeals, a copy of which is appended hereto.

ARGUMENT.

It will be seen from the foregoing statement of the case that the caveator sought about eleven years after the death of his grandfather, during which period he, an adult, had not only silently acquiesced in the provisions of his grandfather's will, but had by numerous overt acts taken benefits thereunder, to have the will declared invalid, thereby unsettling the title to about one hundred and seventy separate parcels of land in the District of Columbia. The proceeding seeks also to reopen the setlement of the estate of the widow, Sarah Utermehle, and to affect the validity of the gifts or disposition made by her after

the death of her husband and prior to her own death of about $400,000.00 or $500,000.00 of personalty. It will be seen that the Court of Appeals questions the jurisdiction of the trial court in this case to consider any issue involving the validity of the will of George W. Utermehle as a will of personalty, or whether even if it had jurisdiction an issue should have been allowed under the circumstances of the case, because of the statute of limitations which in this jurisdiction bars most personal actions in three years. In this suggestion the court seems to have overlooked the fact that if Mrs. Norment and Mrs. Taylor and her representatives are required to account to Charles H. Utermehle for the rents which they have received from the real estate which came to them from their father during the past fourteen years, and to turn over to him a one-third interest in all the real estate involved, the right must be accorded to them to attempt at least to reach that part of the personal estate of their father which their mother took under her husband's will and which in some way disappeared during her lifetime. If suits should be brought by them against the persons who received the $400,000.00 or $500,000.00 in personalty which is unaccounted for, it would be for the defendants in such suits to plead the statute of limitations, if they elected to make such a defense, and the question of the validity of the defense would then be raised and decided.

It will be seen also that during the period of eleven years, when the caveator was apparently acquiescing in the terms of his grandfather's will, the title to about eighty parcels of his real estate passed to Samuel Norment, and that by the equity suit which followed the latter's death, and which involved not only the real estate which came to Samuel Norment from the estate of George W. Utermehle, but a large amount of real estate which belonged to Samuel Norment himself, the title to all these eighty parcels has become so entangled that if the will of George W. Utermehle should be held void it would require years of further litigation to

undo the effect of the decree in the equity suit referred to which was the result of a compromise entered into by all parties, some of whom were infants, and ratified by the court, the compromise being based on the supposition that the will of George W. Utermehle was valid.

It has been the uniform practice in the supreme court of the District of Columbia to give trials of issues involving the validity of wills precedence over all other civil business, because they involve the settlement of estates and the rights of numerous parties. The necessity for early action in this particular case is obvious from what has been above set forth.

There are now pending in the supreme court of the District of Columbia several other suits in which the issue of estoppel, upon which this case turned, is raised, and it is desirable on that account that the important and novel questions of law raised in this case should be speedily determined.

It is respectfully submitted that the motion to advance should be granted.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

APPENDIX.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

CHARLES H. UTERMEHLE, *Appellant*,
v.
MAMIE E. NORMENT ET AL.

WILLS; DECLARATIONS OF TESTATOR; ESTOPPEL.

1. In a will contest testimony as to certain statements or declarations of the testator to the effect that if the caveator, a grandson of the testator, would not take sides in certain legal proceedings then pending in which the testator was interested, he would leave to the caveator a share of his estate equal to that which he would leave to each of the caveator's two aunts, held properly excluded; following Throckmorton *v.* Holt, 180 U. S., 552.
2. One who takes a benefit under a will cannot thereafter be heard to dispute or deny the validity of the will.
3. A party agreeing to the probate of a will and accepting property devised and bequeathed to him thereby is, in the absence of fraud or misrepresentation, estopped to deny the validity of the will, especially where more than eleven years had elapsed before proceedings were brought by him to have it declared void and the status of the other parties had been materially changed.
4. A testator, after a comparatively small provision for a grandson, gave certain real estate and all the rest of his personal estate to his widow, and divided the residue of his real estate equally between two daughters. By consent of all the parties, the will was admitted to probate as a will of personalty, and the provision for the grandson was accepted by him and the real estate devised to him sold. In a proceeding brought by the grandson more than ten years thereafter attacking

the validity of the will, issues were framed, several of which presented the question as to whether the caveator was not estopped to deny the validity of the will. The caveator testified that before the will was probated he was told by one of his aunts that the will had virtually cut him off; that the real estate devised to him thereby had been given him at the solicitation of herself and husband, but that his grandmother, to whom all the personal estate was given, would at her death equalize the matter for him; and in reliance upon this promise, to which the grandmother agreed, he consented to the probate of the will. The will of the grandmother gave him only a share of her estate equal to that given each of his two aunts, which, however, he accepted, made partition of the real estate with his aunts, and parted with his interest. Not until seven years after the death of his grandmother, and eleven years after his grandfather's death, did he seek to avoid the will of the latter. He sought to excuse the delay by claiming that he was ignorant of the law of estoppel, and had acted as soon as he learned his "rights." *Held*, that the acts of the caveator conclusively and as matter of law estopped him to deny the validity of the will; and no fraud or misrepresentation on the part of either of the two aunts being shown, it was wholly immaterial whether or not he was ignorant of the law of estoppel as claimed.

5. *Held*, therefore, that the issue of estoppel having been ruled against the caveator, the trial court properly directed a verdict in favor of the caveatees on all the issues.

No. 1254. Decided May 5, 1903.

Appeal by caveator from an order of the supreme court of the District of Columbia, holding a probate court. Probate No. 3467, admitting a will to probate as a will of real estate, under the act of June 8, 1898. Affirmed.

Mr. R. Ross Perry, Mr. Wilton J. Lambert, and Mr. D. W. Baker for the appellant.

Mr. A. S. Worthington and Mr. T. P. Woodward for the appellees.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia, sitting as a probate court, whereby the will of one George W. Utermehle, admitted to probate in the year 1889 as a will of personalty, was now also admitted to probate, under the act of Congress of June 8, 1898, as a will of real estate.

George W. Utermehle died in this city, whereof he had long been a resident, on April 16, A. D. 1889, leaving a large estate, both real and personal, of which the realty is stated to have amounted to upwards of one million of dollars in value, and the personalty to something approaching the same amount; and leaving also a will, or paper-writing, purporting to be his will, which bore date on December 7, 1887, and which appeared on its face to have been duly executed for the conveyance of real estate. In and by this will, after a bequest of $3,000 to each one of three several nieces, the testator devised to the appellant here, who was a grandson and a son of a deceased son, a piece of property in this city known as the Young law building, of the value of about $20,000; and bequeathed to him also a promissory note for $750, with the accrued interest thereon, secured by mortgage. To his wife, the grandmother of the appellant, he bequeathed all his personal property absolutely, and he devised to her in fee-simple the real estate, which was their place of residence, namely, the whole of square No. 765 in this city. All the rest and residue of his real estate he devised in fee-simple to his two daughters, Mamie E. Norment, then the wife of Samuel Norment, and Rosa M. Taylor, then the wife of Leroy M. Taylor, as tenants in common, with the proviso that if either daughter was not satisfied with the division thus made she should have only $5, and the whole of such real estate should go to the other daughter.

Mrs. Sarah Utermehle, the testator's wife, was made executrix of the will, with the request by the testator that, inasmuch as he had no debts and all the personal property was to go to her, only a very moderate bond should be required of her as executrix.

On April 26, 1899, Mrs. Sarah Utermehle, the widow and executrix of the deceased, propounded the will for probate. On the same day Rosa M. Taylor and Mamie E. Norment, the two daughters of the testator, and his grandson, the ap-

pellant, who were his only next of kin and sole heirs-at-law, executed and caused to be filed in the court a paper-writing, whereby they waived citation and notice by way of publication, and consented that the court might act upon the petition of the executrix for probate without further notice to them. On the same day the will was by order of the court duly admitted to probate—of course, only as a will of personalty, in accordance with the law of the District, as it then stood.

The executrix then gave bond in the sum of $20,000 for the payment of all just debts and claims against the deceased, all damages that might be recovered against her as executrix, and all the legacies bequeathed by the will, and letters testamentary were issued to her. She proceeded with the administration, paid the funeral expenses, and other charges, the legacies to the three nieces, and the legacy to the appellant of the promissory note for $750, with the accrued interest thereon, amounting to the sum of $2,116.88. She filed no inventory, but filed a statement of account in the particulars specified on May 14, 1890. The personal property, other than as thus disbursed, she retained for herself in accordance with the terms of the will, and converted it to her own use. It is stated that she disposed of a very large part of it in charities.

Besides the legacy of the note for $750 and interest, the appellant received his devise of the Young law building, sold it soon afterward for $20,000, and applied the proceeds to his own use. He also received from his grandmother, apparently in the way of a gratuity, sufficient money to pay a mortgage of $11,500, with some accrued interest, which rested on a farm that he had purchased in Frederick county, Maryland. During all this time he does not appear to have ever in any way manifested dissatisfaction with his grandfather's will, or protested against it.

Mrs. Taylor and Mrs. Norment, the daughters and principal devisees of the real estate of George W. Utermehle, entered into possession of that property forthwith, and made partition of it between themselves, each quitclaiming to the other. Immediately afterwards, on July 18, 1889, Mrs. Norment conveyed all her real estate to her husband, Samuel Norment, who died in possession of it in 1891. This conveyance by Mrs. Norment to her husband would appear to have been procured by some duress exerted by him. At all

events, after his death proceedings in equity were instituted by Mrs. Norment to vacate the deed. She was the second wife of Samuel Norment, and had two children by him; but there were children by his first wife. The result of the proceedings was a compromise ratified by the court, whereby Mrs. Norment received substantially about one-third of all the real estate that had belonged to Samuel Norment.

The caveator was about 23 years of age at the time of the death of his grandfather. He testifies that pleasant relations existed between him and his grandfather, and apparently no unpleasant, although evidently no intimate, relations existed between him and other members of his family. He was present at the reading of his grandfather's will immediately after the funeral, and, although disappointed, made no objection thereto. On the next day at the suggestion of his aunt, Mrs. Taylor, he was present again at his grandfather's house, where there were assembled his grandmother, Mrs. Sarah Utermehle; his aunts, Mrs. Rosa M. Taylor and Mrs. Mamie E. Norment, besides himself, and no one else, as it would seem. His account of what was then and there said and done is, in substance, that Mrs. Taylor did all the talking; that she stated that the will of his grandfather had virtually cut off the appellant; that it had been at the solicitation of Mrs. Taylor and her husband, Dr. Leroy M. Taylor, that his grandfather had left the Young law building to him; that his grandmother, however, would, at her death, equalize the matter for him, as she had all the personal property wherewith so to do; that his grandmother wanted to know the amount of the mortgage on his farm, as she desired to pay it for him, and that he thereupon stated the amount as being $11,500. The talking, as stated by him, was all done by Mrs. Taylor. He does not state that Mrs. Norment took any part in it, but that his grandmother seemed to assent to everything that was said by Mrs. Taylor, and that she repeated after Mrs. Taylor that she desired to pay the mortgage upon his farm, which she did in fact almost immediately afterwards.

This conversation the caveator now claims to have amounted to a promise made to him, that, if he would not oppose the probate of his grandfather's will, his grandmother would equalize the matter for him in and by her own will. And he says that it was in reliance upon this assurance that he signed the paper by which he consented

to the probate. He states, also, that some days afterwards he was requested by Mr. Woodward, who it seems was the attorney who had drawn the will, and was one of the witnesses to it, to go to the office of the register of wills; that he went and met there Mr. Woodward, Dr. Taylor, Mr. Norment, his grandmother Mrs. Sarah Utermehle, Mrs. Norment, and Mrs. Taylor; that he was then asked to sign the paper, which the others had already signed, agreeing to the probate of the will; that he did sign it, but without reading it; that he said nothing at all; that thereupon either Dr. Taylor or Mr. Norment said to him: "That is worth $100,000 to you;" that he replied, "I am much obliged—is that all you wish me?" that they said, "That is all;" and that he then walked away.

On March 13, 1893, Mrs. Sarah Utermehle, the appellant's grandmother and the legatee of the personalty and devisee of part of the realty of George W. Utermehle, departed this life, leaving the same heirs-at-law and next of kin as her deceased husband, and leaving also a will, executed on July 5, 1889, which date, as will be noticed, was within a little more than two months after the time of the alleged promise to the caveator that his grandmother would at the time of her death equalize his share of the estate, according to his own statement. In and by this will the testatrix divided her estate equally between her two daughters, Rosa M. Taylor and Mamie E. Norment, and her grandson, the caveator, giving one-third to each, and appointed her two daughters as her executrices, with the request that only a nominal bond should be required.

Rosa M. Taylor, Mamie E. Norment, and Charles H. Utermehle executed and caused to be filed in court a paper waiving citation and notice for the probate of this will and agreeing to such probate without further notice; and accordingly the will was admitted to probate on March 17, 1893. It seems, however, that some question was raised by the caveators, as to the allowance of commissions to the two executrices on the ground that this would give them an advantage in the estate, and they agreed to renounce their commissions. He made no objection then or afterwards on the ground of any alleged failure by his grandmother to perform the promise which he claims to have been made by her, as already stated. Under the administration he received his distributive share of the personalty, amounting to nearly

$78,000, and the administration was settled and closed. He received also his share of the realty, consisting of square No. 765, which had been the residence of his grandfather and grandmother, made partition of it with his aunts, executed quitclaim deeds to them, mortgaged his own one-third part of it while it was yet undivided, and subsequently allowed it to be sold under the mortgage. This partition took place in 1895.

On May 19, 1900, when ten years had just elapsed from the final settlement of the estate of George W. Utermehle, and after the lapse of nearly seven years after the final settlement of the estate of Sarah Utermehle, the caveator addressed identical letters to his aunts, Rosa M. Taylor and Mamie E. Norment, in which he alleged that at the time of his grandfather's death he was under a misapprehension and ignorant regarding his alleged rights in his grandfather's estate; that misrepresentations had been made in regard to those rights and his interests in the premises; that he now denied the validity of his grandfather's will either as to realty or as to personalty; and that he tendered himself ready to account to Mrs. Taylor and Mrs. Norment for what he had received under the alleged will.

This notification, it seems, he follows up with a suit in ejectment, and with a caveat filed in the probate court on June 9, 1900, against the validity of the will. Mrs. Taylor and Mrs. Norment answered the caveat, and at the same time filed a petition asking for a probate of the will of George W. Utermehle of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898.

Pending proceedings in the probate court upon this caveat, and before any issues had been formulated between the parties, Mrs. Rosa M. Taylor died on January 22, 1901, leaving a will executed on December 3, 1889, whereby she devised and bequeathed all her estate to her husband, Dr. Leroy M. Taylor, in fee simple, subject to an annuity of $3,000 a year in favor of their son and only child, Leroy M. Taylor, Jr., and also nominated her husband as the executor of her will. On March 18, 1901, this will was duly admitted to probate, and letters testamentary thereon were issued to Dr. Taylor.

Thereupon, on the same day, Dr. Taylor filed his petition in these proceedings, in which he set forth the will of his deceased wife in his favor, and at the same time set forth a

declaration of trust executed between himself and his son, Leroy M. Taylor, Jr., on February 15, 1901, wherein it was stated that the property devised and bequeathed to him by his wife in fee simple was in fact held by him under a secret trust between her and him for the benefit of their son, Leroy M. Taylor, Jr., and his children, of whom there were then two, yet in their infancy, Mildred Taylor and Dorothy Taylor, with the reservation of certain rights and powers for himself; and he asked that he himself and all the persons named might be made parties to the present proceedings in the place and stead of Mrs. Rosa M. Taylor. They were accordingly made parties, and Leroy M. Taylor, Jr., was appointed by the court as guardian *ad litem* for his infant children.

At last the court determined that issues should be formulated between the parties, to be tried in the probate court itself, with a jury, under the act of June 8, 1898, and there were six such issues drawn up. The first raised the question whether the caveator was estopped to deny validity of the will of George W. Utermehle as a will of personal property. The second raised the question whether he was estopped to deny the validity of the will as one of realty. In the third issue the question of testamentary capacity was raised; in the fourth, that of undue influence; in the fifth, that of fraud, and in the sixth, that of duress. The question of the application of the statute of limitations, which was raised by the caveat and petitions, and all other questions, were reserved for future determination by the court. The caveator, Charles H. Utermehle, was made plaintiff for the purpose of the trial, and all the other parties, as caveatees, were made defendants.

On March 17, 1902, a jury was empaneled and sworn in the cause, and the caveator proceeded to adduce his testimony, which mainly was that of himself. It was mainly addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for the caveator announced their testimony on this point as closed, they proceeded to offer testimony upon the other issues. To this the counsel for the caveatees objected and moved the court to direct a verdict against the caveator on the issue of estoppel, and, following that, upon all the other issues. The court ruled out for the time being the offer of the caveator to adduce testimony on the other issues

than estoppel, and seems to have adjourned the jury for the purpose of consideration of the question of estoppel as now raised by the record and by the testimony in the cause. After such consideration the court instructed the jury to render a verdict against the caveator on each and all the issues, and the verdict was so rendered and recorded.

Thereupon an order or decree was rendered, confirming the order of the court of April 26, 1889, whereby the will of George W. Utermehle had been admitted to probate as a valid will of personalty; and now admitting it to probate also as a valid will of real-estate.

From this decree the caveator, Charles H. Utermehle, has appealed to this court.

There are seven assignments of error: (1) That it was error to hold that the caveator was estopped, at the time of the filing of his caveat, from disputing the will of George W. Utermehle as a will of personalty; (2) that it was error to hold that he was estopped from disputing it as a valid will of realty; (3) that it was error to instruct the jury to return a verdict against the caveator on the issues of estoppel; (4) that it was error to direct a verdict against the caveator on all the issues; (5) that it was error to direct a verdict against the caveator on the issues that did not involve the question of estoppel; (6) and (7), which are merely duplications of each other—that it was error to exclude the testimony of the caveator as to certain alleged statements and declarations claimed to have been made to him by his grandfather as to his testamentary intentions toward the caveator.

1. Taking up the last of these assignments first, we find that the purport of the statements and declarations referred to is that George W. Utermehle stated to the caveator on one or two occasions, that if he, the caveator, would not take sides in certain legal proceedings then pending in which he, the grandfather, was involved, he, the grandfather, would leave to the caveator a share of his estate equal to that which he would leave to each of the caveator's two aunts. Now it is very plain to us that under the decision of the Supreme Court of the United States in the case of Throckmorton *v.* Holt, 180 U. S., 552, evidence as to such alleged statements was properly excluded.

It is argued, however, that notwithstanding that decision, such statements are admissible in evidence where there is question of the mental capacity of a testator. But we fail to

see the force of this argument. No one questions, and least of all the caveatees question, the mental capacity of George W. Utermehle at the time at which these statements and declarations are alleged to have been made. And if the meaning of the argument is that they tend to show his subsequent mental incapacity at the time of the making of his will, the plain answer is that they are utterly irrelevant and ineffectual for any such purpose.

2. The substantial question in the present case is that of estoppel. This question controls the whole case, and if the trial court has decided it correctly, the rulings upon other questions are of no consequence. We think that it did decide it correctly.

The doctrine is too well established to need either argument or citation of authority in support of it, that one, who takes a benefit under a will, cannot thereafter be heard to dispute or deny the validity of the will, and it is needless to say that the doctrine is founded upon the plainest principles of justice. We do not understand that this rule of the law is in any manner questioned by counsel for the caveator, nor do we understand it to be denied that in the absence of fraud or misrepresentation the action of the caveator in the premises, as detailed by himself, would constitute a full and complete estoppel upon him to prevent him from contesting the validity of his grandfather's will. He agreed to the probate of that will, and he took property under it, both real and personal, and that this, especially after the lapse of so long a period as eleven years that intervened between the probate and the filing of his caveat that led to the present proceedings, would constitute an estoppel, is very evident.

The claim, however, on behalf of the appellant is that what he did he was induced to do by misrepresentation and fraud; that he was ignorant at the time and for a long time afterwards of the law of estoppel, and that as soon as he discovered what he calls his rights, he notified Mrs. Taylor and Mrs. Norment, and repudiated the will of his grandfather, and offered to account to his aunts, in some way not very clearly defined, for what he had received under the will. This offer to account he regards as equivalent to a tender of the property received by him.

It is exceedingly improbable that all the caveator's relatives, including his grandmother, conspired to defraud this

young man. It is more than probable that the promise, which was made to him, if any there was actually made, was that he should share equally with his aunts in his grandmother's estate; and this promise his grandmother fully and faithfully performod. But, however, this may be, and even if the alleged promise was in fact what he now claims it to have been, it is difficult to see how a promise by his grandmother and subsequent failure on her part to perform it can constitute misrepresentation and fraud on the part of Mrs. Taylor and Mrs. Norment sufficient to induce the appellant to refrain for eleven years from contesting the validity of his grandfather's will. And this is absolutely all the misrepresentation and fraud that is charged or sought to be shown.

There is no pretense that Mrs. Taylor was not acting in good faith when she made the alleged promise on behalf of her mother, nor is there any pretense that Mrs. Norment was guilty of any fraud in connection with it when she merely stood by and said nothing. Neither of them made any promise whatever on her own account; nor is there either allegation or evidence of any fraud, or fraudulent concealment, or fraudulent inducement of any kind practiced by them upon the appellant or held out by them on their own account on which he was led to act. That they were probably desirous to have the will of their father probated without controversy and its validity conceded may well be assumed, although it is not entirely apparent that they received any more of the whole estate under the will than they would have received under the law if there had been no will. But any desire which they may have had to avoid a possible contest cannot be charged to them as fraud. We find no evidence whatever in the record of any fraud or misrepresentation on their part.

The only promise which was made was the promise of the appellant's grandmother, made, it is true, through Mrs. Taylor, but yet, notwithstanding that fact, the promise exclusively of the grandmother. And it was the grandmother who mainly, if not exclusively, profited by the exclusion of the appellant from any large share in the estate. But if the plaintiff relied upon this promise and was induced thereby to forego any action against the will, and that promise was not afterwards performed by his grandmother, the remedy of the appellant was not to return to an attack upon

the will, but was by action of some kind against his grandmother's estate, and he took no such action. Her delinquency, if there was any such, which we greatly doubt, should not be visited upon Mrs. Taylor and Mrs. Norment, who are not shown to have had any part in it.

Then, if there was no misrepresentation or fraud on the part of Mrs. Taylor or Mrs. Norment, it is wholly unimportant whether, at the time when he committed the acts which constitute the estoppel, the appellant was or was not ignorant of the law of estoppel. By those acts he led Mrs. Taylor and Mrs. Norment into a situation from which, notwithstanding the ingenious argument of counsel to the contrary, they cannot now be restored to their original status. Upon the faith of those acts and the probate of the will they surrendered their right to a large amount of personal property, and a large amount of real estate also, to which they would have been entitled in the absence of a will. It is impossible to tell from the record before us whether they fared any better with the will than they would have fared without it; but it is very evident that, by the bequest of the entire personalty by the will to their mother they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation; and the attempt to do so would be wantonly to question titles that have long since accrued, including the very title which the caveator has himself disposed of, to the Young Law building.

3. Certain cases are cited to show that, when a person has acted in ignorance of his legal rights under a will as to election whether to take under the will or to assert an independent title against the will, he will not be estopped, if in due time he tenders back to the executor what he has received under the will. These cases are Spread *v.* Morgan, 11 H. L., 588, and Watson *v.* Watson, 128 Mass., 152. But we do not understand that these cases are here applicable. It is, perhaps, a matter of minor importance that there is here no executor now in existence of the estate of George W. Utermehle to whom the appellant could tender back the amount of the personalty which he received from that estate; and perhaps it is equally unimportant that no tender of the real estate received and appropriated by the appellant under the will could be tendered back to such executor in any event, as such executor had nothing to do with the real estate. It is perhaps more important that the appellant has precluded

himself from making any tender whatever of such real estate to anyone by the fact that he has conveyed it away; but assuming that such tender or surrender could be made by the appellant, and assuming that the offer to account which he has made is the equivalent of a proper tender, which is very greatly to be doubted, but which we do not decide, yet the appellant's case is not governed by the authorities cited.

The two cases in question were cases in equity wherein, according to the rule of equity, a party was required to make his election as to which he would take of two inconsistent rights. In the first-mentioned case, that of Spread *v.* Morgan, in the English House of Lords, a man had come into the possession of one piece of property under an ancient entail, and into the possession of another piece of property under a more recent family settlement. The details of the case are complicated, but it will suffice to say that it was inconsistent in equity for the party to hold both pieces as against another man who was also entitled in a subordinate manner to one of the pieces under the family settlement. He was required to elect which of the two pieces he would hold; or rather, the inquiry was whether he had in fact elected when a court of equity held that he should have done so. It appeared that he knew all the facts, but that he did not know that by the rules of equity he was bound to elect.

Speaking for the House of Lords, sitting as a court of appeal, Lord Chancellor Westbury said:

"It is true, as a general proposition, that knowledge of the law must be imputed to every person; but it would be too much to impute knowledge of this rule of equity. Election, as a question of intention, of course implies knowledge. There may be a series of unequivocal acts from which an intention to elect and the fact of actual election may be inferred; but under the circumstances of the present case, it does not appear to me that any such inference can be drawn."

And Lord Chelmsford, in the same case, said:

"In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence."

In the case of Watson *v.* Watson, in the supreme judicial

court of Massachusetts, three nephews and an uncle held a piece of real estate as tenants in common. The uncle died leaving a will, by which he made bequests of his personalty specifically to his nephews; devised about two acres of the common property, by specific description of it, to one of the nephews, James; devised 10 acres of the same property, by similar specific description, to a grandnephew, Horace; and devised the remainder of his real estate, specifically excluding that previously devised, to another nephew, Albert, for life, with remainder in fee-simple to Albert's son. One nephew, Edward, received none of the real estate, and only a legacy of $50 in money. All the parties received their legacies and entered upon the lands devised to them, notwithstanding that, as stated by the court, the devises were ineffectual as against the co-tenants, unless they had confirmed it.

It appears that all the parties were ignorant of the rule of law laid down in Massachusetts in the case of Hyde *v.* Baldwin, 17 Pick., 303, by Chief Justice Shaw, which was this, as stated by the Chief Justice himself:

"It is now a well-settled rule in equity that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will; or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will."

Upon being informed of this rule two of the three nephews took no steps to restore to the executor the personal property which they had received, or otherwise to renounce their claims under the will, further than to sign a paper wherein they reserved to themselves the right thereafter to elect, upon a decision of the law, if they should desire. As to them the court held that the rule of law, as laid down in the case of Hyde *v.* Baldwin, applied. But the third nephew Edward, who had received a legacy of $50, but none of the land, stood, it was said, in a different attitude. "Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it." It was said by the court, in a suit

thereafter instituted for partition of the whole property, that he could not be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate.

In that case the supreme judicial court of Massachusetts, by Mr. Chief Justice Gray, said:

"In this Commonwealth it has been decided, in accordance with the opinions of Lord Mansfield, Lord Loughborough, and Lord Redesdale, that the rule (that laid down by Chief Justice Shaw, as already stated) holds good at law as well as in equity. * * * But this doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts, is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. (Citing cases.)

"Where the law allows the probate of a will in either of two forms—in common form, *ex parte*, upon being presented by the executor, or in solemn form, upon the application of any person interested and notice to all others—a person who has received a legacy under a will proved in common form is permitted, on tendering back the amount to the executor, or bringing it into court, to contest the validity of the will, and compel it to be proved in solemn form. Bell *v.* Armstrong. 1 Add. Eccl., 365, 374, and cases cited. Hamblett *v.* Hamblett, 6 N. H., 333; Holt *v.* Rice, 54 N. H., 398."

We have been at pains to cite these two cases *in extenso*, because they are the principal reliance of the appellant, and his cause was tried in the court below with special reference to the case of Watson *v.* Watson. But we are very clearly of opinion that the appellant is not aided by these authorities. His case is not one of election, but of estoppel. He made his election, when election was open to him; and he is now estopped from seeking that which he declined. It is idle for him to say that he did not know that he had the right of election, and that he acted in ignorance of his rights. Every man of ordinary sense and capacity is bound

to know that he can not take a benefit under a will and at the same time seek to overthrow the will. It was distinctly presented to him to make that election when he was asked to sign the consent to the probate of his grandfather's will; and he then made it, and he confirmed the election by taking his legacy and the real estate devised to him and disposing of it beyond the possibility of his ever being able to return it to the estate. The election referred to in the cases of Watson *v.* Watson and Spread *v.* Morgan is election between two inconsistent rights, not election between two inconsistent courses of action. At the time of the probate of his grandfather's will he knew, as well as he did at any time afterwards, that, if there were no such will, or if he could overthrow such will, he could get a larger share of his grandfather's estate than he could get, or did get, under the will. There was no ignorance on his part of any rights which he might have. What he discovered afterwards, if he discovered anything, was not any alleged right, but the testimony to support that right, which makes a very different proposition.

It is very plain from what is distinctly stated by the supreme judicial court of Massachusetts in the case of Watson *v.* Watson that the right of election there mentioned must have been exercised before the executor has settled his accounts, and before the position of any person in interest has been changed. It is idle to argue here that, because the appellees in these proceedings are in possession of some of the real estate that belonged to George W. Utermehle, therefore the position of no one in interest at the time of the probate of his will has been changed. It is sufficient to say in answer to this argument that the action of the appellant enabled the executrix of George W. Utermehle to divert the whole of the personalty of that estate from Mrs. Taylor and Mrs. Norment, who would have been entitled to a large share of it in the absence of a will. They lost all right to this personalty; they lost all right to a large portion of the real estate, and it is not apparent that the appellant could compensate them for this loss by the surrender of all that he received under the will, even if he were in condition to make such surrender.

We are very clearly of opinion that it is now too late for the appellant to question the validity of his grandfather's will, and that he has estopped himself from so doing. His

course of conduct, as conceded and proved by himself, conclusively and as matter of law operates as an estoppel upon him. There was nothing whatever in the case to be submitted to a jury; and the court was entirely right in directing a verdict for the caveatees. A verdict for the caveatees on the question of estoppel necessarily superinduced a verdict for them on the other issues.

4. We may add here that it is greatly to be questioned whether the probate court had jurisdiction in this case to formulate and try the first of the six issues which were drawn up—that of the estoppel of the caveator to dispute the validity of the will of George W. Utermehle as a will of personalty, or whether, if it had the jurisdiction, the issue should have been allowed under the circumstances of the case.

The will had been admitted to probate as a will of personal property in 1889, with the concurrence and consent of the appellant. Even if that consent had been procured by misrepresentation and fraud, as claimed by the appellant, that fact would have made no difference in the present connection. Acting upon that consent, the executrix took possession of the personalty and distributed it, in accordance with the provisions of the will, to the legatees therein, the principal part of it to herself as the principal legatee. She settled her account, and the administration was at an end; and there had been no case in court for ten years before the appellant's caveat was filed. Even if the will were declared null and void as the result of that caveat, the statute of limitations would interpose an insuperable bar to the recovery of that personalty, or of any part of it, by any administrator of the estate of George W. Utermehle, or by anyone else in interest.

Moreover, upon the caveator's own showing, he received one-third of his grandmother's personal as well as real estate, equal to what each one of his aunts received. Apart from the estoppel which would preclude him from denying that this was the money of his grandmother after he had received it as such, and presuming that it was lawfully and in fact the money of his grandfather, he received more of the personal estate of his grandfather, by the amount of the note for $750 and interest, than either Mrs. Taylor or Mrs. Norment received. With what propriety, then, or to what reasonable purpose could he seek to have the will declared

void as a will of personalty? He would not be entitled to any more, or to as much as he actually received, if the will were so declared.

There was nothing in the appellant's caveat that justified the reopening of any inquiry as to the validity of the will of George W. Utermehle as a will of personal property, and it was an irregularity to have allowed it. But no harm has come from this irregularity, since the result has been to confirm the previous probate of the will, and consequently the settlement of the personal estate thereunder.

From what we have said it follows that the decree appealed from must be affirmed, with costs.

And it is so ordered.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 68.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE R. NORMENT ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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Attorney for Defendants in Error.

T. PRESTON WOODWARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 63.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

George W. Utermehle died in the city of Washington on April 16, 1889, owning real estate of the value of about one million dollars (118), and possessed also of a large personal estate. He left a widow, Sarah Utermehle. His heirs and next of kin were his two daughters, Mamie E. Norment, wife of Samuel Norment, and Rosa (or Rose) Taylor, wife of Dr. Leroy M. Taylor, and a grandson, Charles H. Utermehle He left a will which he executed December 7, 1887, by which, after giving $9,000 to certain nieces in Germany, he devised to his grandson, Charles H. Utermehle, the Young law building, in Washington, D. C., and also the principal and interest due and to become due on a certain $750 note. He gave to his wife, Sarah Utermehle, all the rest of his personal property, and also devised to her the family residence and the surrounding grounds in square numbered 765, in

the city of Washington. All the rest of his real estate he gave to his two daughters, Mrs. Norment and Mrs. Taylor, as tenants in common, "to be equally divided between them." He also directed that if either of his daughters should be unwilling to divide the real estate or should be dissatisfied with the division made, the one who was not satisfied should have five dollars, and the whole of the real estate should go to the other daughter or her heirs. He appointed his wife the executrix of his will (116, 117).

On the 26th day of April, 1889, Sarah Utermehle, as executrix, filed a petition in the supreme court of the District asking that this will be admitted to probate, and that letters testamentary should be issued to her (1). At the same time, apparently, there was filed a waiver of citation, signed by Mrs. Taylor, Mrs. Norment, and Charles H. Utermehle (21). On the same day the will was admitted to probate, the bond of the executrix being fixed in the sum of $20,000 (2). On May 3 following, the order was modified by providing that the bond of $20,000 should be "conditioned for paying all just debts of, and claims against, the deceased, and also all damages which shall be recovered against her as executrix, and also all legacies bequeathed by the will" (3).

This special bond was authorized by the Maryland act of 1798, chapter 101. Section 6 of subchapter 14 of that act provided:

"6. No executor shall be obliged to exhibit any inventory, or account, provided he will give bond, instead of the bond hereinbefore directed, with such security, and in such penalty, as the court shall approve, to the State of Maryland, to be recorded and sued as before directed, with condition 'for paying all just debts of, and claims against, the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will,' provided the said executor be residuary legatee, or provided the residuary legatee of full age, shall notify his or her consent to the court; and in case such bond be given by an executor, he shall be answerable for all debts, claims and damages, recovered against him as executor; and if suit be

brought against him as executor, the judgment shall be for the whole sum found by the jury, or otherwise ascertained, and execution may issue, and have effect, as if he were sued in his own right; and any legatee shall be entitled to recover the full amount of his legacy, either in a suit upon the said executor's bond, or in a suit in chancery, as is usual in case of legacies, or in an action on the case, in which the giving of such bond shall be considered as an assent to the legacy."

On May 14, 1890, the executrix filed her final and only account, setting forth that she had paid all the debts of the estate and all expenses of administration and all the legacies (4). With her account she filed proper receipts from the legatees, including one from Charles H. Utermehle, showing the payment to him in full for the principal and interest of the note bequeathed to him, the sum of $2,116.88 (4, 5).

It was a conceded fact in the case that Charles H. Utermehle immediately after his grandfather's death took exclusive possession of the Young law building under the will, and held it in that way until about a year afterwards, when he sold it for $20,000 (66, 90).

Mrs. Normeat and Mrs. Taylor, in accordance with the provisions of the will, divided between them nearly all the real estate (except the property in square 765, devised to the widow). The remainder they sold and divided the proceeds.

Sarah Utermehle died on March 13, 1893. She left a will by which she divided her estate equally between Mrs. Taylor, Mrs. Norment, and her grandson, Charles H. Utermehle, directing that any sum or sums which she had advanced to either of her daughters or to her grandson during her lifetime should be charged against their respective shares of her estate (119). She appointed Mrs. Taylor and Mrs. Norment executrices. They filed a petition accordingly in the supreme court of the District on the 17th of March, 1893. With the petition was a waiver of citation signed by them-

selves and also by Charles H. Utermehle. On the same day the will of Sarah Utermehle was admitted to probate (120). In the distribution of the personal estate of Sarah Utermehle under her will each of the three beneficiaries received the sum of $84,256.87, including advances which had been made to each of them by Sarah Utermehle during her lifetime (91, 92, 122).

By an act of Congress approved June 8, 1898, the supreme court of the District of Columbia, holding a probate term, was authorized for the first time to admit to probate wills of real estate (30 Stat., 436). The same act prescribed the procedure in contested will cases and made the judgment in such cases binding on everybody, and provided that wills which had been admitted to probate before the passage of the act as wills of personal property should be unassailable unless proceedings were instituted within one year thereafter.

On the 9th day of June, 1900, over eleven years after the death of his grandfather, Charles H. Utermehle filed a petition averring that when George W. Utermehle executed his will he was of unsound mind, and that the execution of it had been procured by undue influence, fraud, and coercion, and praying, accordingly, that probate of the instrument as a will of personalty should be set aside and that it might be refused probate as a will of real estate.

On the 19th day of July, 1900, Mrs. Taylor and Mrs. Norment filed an answer to this petition, in which they denied the charges of unsoundness of mind, undue influence, fraud, and coercion (7–8), and set up the 10th section of the act of 1898 [see page 4 of this brief] as a bar to further proceedings by Charles H. Utermehle (8–9). They also averred that by accepting the provisions in his favor in the will of George W. Utermehle and in the will of Sarah Utermehle and by divers other acts Charles H. Utermehle was estopped to controvert the will of his grandfather (9–10).

On the 17th of November, 1900, the caveator excepted on

a variety of grounds to so much of the answer of Mrs. Taylor and Mrs. Norment as referred to the statute of limitations (32).

When Mrs. Norment and Mrs. Taylor on the 19th day of July, 1900, filed their answer to the petition of Charles H. Utermehle, they, at the same time, filed a petition by which they sought to have the will of their father admitted to probate as a will of real estate (11–14). In this petition they again set up the facts upon which they relied to establish that Charles H. Utermehle was estopped to contest the will of his grandfather, and averred that notwithstanding this he had filed his petition and caveat of June 9, 1900, and also had brought suit in ejectment against Mrs. Taylor by which he sought to recover a one-third interest in over thirty parcels of real estate devised by George W. Utermehle to the petitioners.

On the 27th day of September, 1900, Charles H. Utermehle filed a petition in which he referred to the application to have the will of George W. Utermehle admitted to probate as a will of real estate and repeated his charges of unsoundness of mind, undue influence, fraud and coercion, and asked the court to frame issues accordingly for trial by jury (17–18). On October 30, 1900, by way of further answer to the caveat of September 27, 1900, and in addition to the matters set forth in their petition of July 19, 1900, Mrs. Norment and Mrs. Taylor plead section 10 of the act of 1898 as a bar to any opposition on the part of Charles H. Utermehle to the admission of the will to probate as a will of real estate (19–20).

On the 3d of November, 1900, Charles H. Utermehle filed a paper in which was set out at great length his reply to the claim of estoppel (22–29). The contents of this paper will be fully considered below in discussing the questions raised by the bill of exceptions in this case.

On November 17, 1900, Charles H. Utermehle excepted on a variety of grounds to the plea of the statute of limita-

tions filed by Mrs. Norment and Mrs. Taylor on the 30th of November, 1900 (31). On the 7th day of January, 1901, the caveatees joined issue with the caveator on his answer of November 3 to the plea of estoppel (33).

On January 22, 1901, Mrs. Taylor died. Under her will and an agreement in relation thereto between her husband and her son, Leroy M. Taylor, Jr. (35–37), they and the children of Leroy M. Taylor, Jr., became parties in interest and were accordingly made caveatees in the place of Mrs. Taylor (33–38).

On March 27, 1901, six issues were framed in the case which involved the submission to a jury of the questions of estoppel, soundness of mind, undue influence, fraud, and duress or coercion. By the same order the question of the application of the statute of limitations and other questions of law which could have been raised prior to the framing of the issues and not passed upon by the court during the trial of the issues were reserved by the court for future determination (38–39).

After a trial which lasted for several weeks, the court sustained a motion on behalf of the caveatees to instruct the jury to find in favor of the will upon all the issues upon the ground that the evidence submitted on behalf of the caveator showed that he was estopped to controvert the will (160–161).

The trial judge, Mr. Justice Barnard, filed a written opinion giving the grounds upon which he sustained the motion (161–170).

During the trial certain evidence of alleged declarations by the testator in favor of the caveator were offered, and objection thereto sustained under the ruling of this court in the Holt will case (Throckmorton *vs.* Holt, 180 U. S. 552 (53–56).

A verdict in favor of the will on all the issues having been rendered by the jury under the instruction of the court, the caveator filed a motion for a new trial, which was overruled,

the court by the same order confirming the order of April 26, 1889, admitting the will to probate as a will of personalty, and also directing that it be admitted to probate and record as a will of real estate (43).

From this judgment the caveator, Charles H. Utermehle, appealed to the Court of Appeals of the District of Columbia. That court affirmed the judgment. The opinion of the Court of Appeals, which was delivered by Mr. Justice Morris, is in the record (180 to 192). The caveator then brought the case here by writ of error.

While the case was pending in this court Leroy M. Taylor, Senior, died testate. The Washington Loan and Trust Company, as executor and trustee under his will, has been made a party in his place. His sole heir-at-law, his son, Leroy M. Taylor, Jr., was already a party.

ARGUMENT.

I.

THE STATUTE OF LIMITATIONS.

Section 10 of the act of June 8, 1898 (30 Stat., p. 437), is as follows:

"SEC. 10. That the record in the office of the register of "wills for the District of Columbia of a duly certified copy, "or transcript of the record of proceedings, admitting any "will or codicil to probate outside of the District of Columbia; "and the record in said office of any will or codicil heretofore "admitted to probate in said District, and which shall not have "been annulled or declared void according to the law prior to "the passage of this act, shall be deemed and held, at law and "in equity, as of the same and like force and effect as if "such will or codicil had been duly proved and admitted to "probate and record under and in accordance with the pro-"visions of this act: *Provided*, That the provisions of this

"section shall not apply to any proceedings at law or in "equity pending at the date of the passage of this act, or "commenced within one year after the passage of this act, "wherein or whereby the validity of such will or codicil is "or shall be called in question."

By section 6 of the same act it was provided that a judgment admitting a will to probate, subject only to proceedings in error, and to such revision as the common law provides, should be *res judicata* as to all persons, and that the validity of any such judgment should not be impeached or examined collaterally.

Hence, in those cases to which section 10 applies, after the expiration of a year from the passage of the act, a will admitted to probate prior to June 8, 1898, was placed on the same footing as a will to which a caveat had been filed and which had been adjudged valid after a trial of the issues raised thereby.

This section has not been construed either by the supreme court of the District of Columbia or by the Court of Appeals of the District in this case, or in any other case. The supreme court of the District in framing the issues in this case specially reserved the question of the application of the statute of limitations (59). As the verdict and judgment on the issues were in favor of the caveatees, it was not necessary for that court to consider the question so reserved.

In the opinion of the Court of Appeals in this case this matter is not referred to, although it was fully considered and argued in the briefs and in the oral argument in that court.

Prior to this act of 1898 the title to real estate in the District of Columbia was not barred by adverse possession until that possession had lasted for twenty years (Stat. 21, James I, chap. 16, sec. 1; Abert's Comp., 358). Consequently, prior to that date, even when a will devising real estate in the District had been fully proved and admitted to probate and record as a will of personal property, the title to all the real

estate covered by the will was left in doubt in all cases for twenty years, and in cases where infants and lunatics were concerned for a longer period. The difficulties experienced by examiners of title because of this omission in our laws and the efforts they made from time to time to have it remedied are well known. The records of Congress will show that section 10 of the act of 1898 was added thereto after the bill had been prepared by the Bar Association of this District and introduced in Congress. It is common knowledge that that section was prepared and its addition to the statute urged by Mr. Mahlon Ashford on behalf of a corporation engaged in the examination of titles to real estate in the District. The object of it is manifest. It was to require that any assault that was to be made upon wills theretofore admitted to probate and not then in contest must be made within one year thereafter. When that year elapsed, the right to contest was at an end.

It is true that while by section 5 of the act of 1898 any person actually served with process was required to file a caveat within one year thereafter or be barred, an exception was made in favor of parties outside of the jurisdiction who were served by publication, such persons being allowed two years, and that another exception was made in favor of person under twenty-one years of age, who were allowed one year after becoming of age to file a caveat, and that if section 10 be held to apply to wills of real estate probated before the act of 1898, no such exceptions would apply. But this is true of all wills admitted to probate before the act of 1898. As to wills of personal property only admitted to probate prior to the act of June 8, 1898, a caveat was required to be filed within one year after the passage of the act, whether the caveator were a minor or not, and whether he had been brought in by personal service or process or by publication. The distinction that Congress intended to make by section 10 was not between wills of personal and wills of real estate, but between

wills which had been admitted to probate before the act was passed, on the one hand, and those in which proceedings were pending at the date of the act or were begun thereafter, on the other hand.

It does not affect this conclusion that prior to the passage of this act the supreme court of the District, holding a probate term, had no jurisdiction of a will as a will of real estate. If the act had undertaken to give any effect as a will of real estate to the probate of a will before the act was passed, a question might, indeed, have arisen as to whether Congress could declare a will effective as a will of real estate because it had been admitted to probate as a will of personal property only by a court which had no jurisdiction of it as a will of real estate. But in this case Congress has not attempted to do that. It has simply fixed a period of time within which assaults upon wills must be made when the will was admitted to probate prior to June 8, 1898. As the bill stood before section 10 was inserted there was no statute of limitations as to wills previously admitted to probate, whether they were wills of personal property or real estate or both. This was a very serious defect in the bill. It may be argued that one year from the passage of the act was a short time within which to limit proceedings against all wills which had theretofore been probated in the District of Columbia; but that was a matter for Congress to pass upon. The period of one year so fixed is clearly not so short as would lead the court to hold that it is so unreasonable as to make the provision void. It is worthy of note in this connection that, although over six years have now elapsed since the act was passed, this is the only case in which a caveat has been filed to a will previously admitted to probate.

In Koshkonong *vs.* Burton, 104 U. S., 658, this court upheld an act of the legislature of Wisconsin which shortened the time within which an action upon a sealed instrument should be brought in that State from twenty years to six years, with the proviso that any such action

might be brought within one year after the act took effect. It was said in that case that the power is subject only to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect.

In Wheeler *vs.* Jackson, 137 U. S., 245, an act of the legislature of New York was sustained which reduced the time within which certain actions or special proceedings might be instituted, and allowed a period of only six months from the passage of the act for the bringing of actions which would otherwise be cut off by the shortening of the time.

To the same effect are Terry *vs.* Anderson, 95 U. S., 628–632; Mitchell *vs.* Clark, 110 U. S., 633–643, and People *vs.* Turner, 168 U. S., 90. In the last-mentioned case the act concerned was a statute of the New York legislature which provided that deeds from the comptroller of the State of lands in the forest preserve sold for non-payment of taxes should, after having been recorded for two years, and in any action brought *more than six months* after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes. The court held that this was a statute of limitations, but that it did not deprive the former owner of such lands of his property without due process of law.

It will not, of course, avail the caveator to say that he claims that he did not discover until more than a year after June 8, 1898, the evidence upon which he based his caveat. Whether he had sufficient evidence to go to the jury on this alleged late discovery is discussed further on in this brief. But even assuming the fact to be as he avers, the court cannot read an exception into the statute which the legislature did not see fit to place there. In a case decided by the

supreme court of errors of Connecticut in January, 1904, that court held that a statute which allowed only one year for an appeal from any order admitting a will to probate applied to a case in which the appeal was taken more than a year after the will was admitted to probate, although the appellant first learned more than a year after the probate that he was a legatee under a later will (Delahanty *vs.* Pitkin, 56 Atl. Rep., 881).

Since the foregoing was written the brief of the plaintiff in error in this court has been received. It is now suggested by opposing counsel that section 10 of the act of 1898 has no application to proceedings in the probate court, but affects only suits "at law or in equity." If this contention be correct, then we have this absurd state of things: The caveat can be sustained and the will may be set aside, yet in the ejectment suit which was brought against Mrs. Taylor by the plaintiff in error this section might be pleaded as a complete defense. And so in every other case a will might stand or fall in a probate court, yet the judgment of that court would have no effect at all in any proceedings which might be brought by the devisee to recover the property, if the will should be sustained. It is submitted that it cannot be supposed that Congress intended such an absurdity as this, and that the words "at law or in equity" should be construed as referring to legal proceedings in any court.

A case involving very similar considerations was before this court in the case of Ormsby *vs.* Webb, 134 U. S., 64. That case was a contest over a will in the probate term of the supreme court of the District, and after a final judgment in favor of the will the caveator brought the case up by writ of error. A motion was made to dismiss on the ground that the case was one of equity jurisdiction and should have been

brought up by appeal. In overruling the motion this court said:

"And we are of opinion that the last motion to dismiss, which proceeds upon the ground that this case is one of equitable cognizance to be reviewed here, if at all, only upon appeal, must also be overruled. It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the supreme court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity. The last motion to dismiss, must, consequently, be denied."

In the case of Childs *vs.* Childs, 49 Md., 509, the court of appeals of Maryland held that English matrimonial cases were subject to the jurisdiction of the ecclesiastical courts, which were governed by the principles of the canon and civil law, which to that extent became a part of the common law, and as such were recognized by the declaration of rights, and by the constitution of Maryland, as a part of the law of the land. Congress by the act of February 27, 1801, made the laws of Maryland the law of this District (2 Stat., 103).

It is further suggested in the brief on behalf of the plain-

tiff in error that section 10 of the act of 1898 was repealed by the District Code before the trial of this case.

The Code was approved March 3, 1901. This case was tried in the spring of 1902. Section 10 of the act of 1898 was not carried into the Code. But section 1638 of the Code provides:

"The repeal by the preceding section of any statute, in whole or in part, shall not affect any act done or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before such repeal, but all rights and liabilities under the statutes or parts thereof so repealed shall continue and may be enforced in the same manner as if such repeal had not been made: *Provided*, That the provisions of this Code relating to procedure or practice and not affecting the substantial rights of parties shall apply to pending suits or proceedings civil or criminal."

Moreover, as was held in Campbell *vs.* Holt, 115 U. S., 620, after the bar of the statute had taken effect, Congress could not affect the right to the real estate and personal property involved in this proceeding adversely to the caveatees by repealing the statute. As was said by Mr. Justice Miller in delivering the opinion of the court in that case:

"It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

Probably it was because of this principle that section 10 was omitted from the Code. The bar of the statute had already operated in all cases so as to vest in the holders the

title to the real and personal property of decedents whose wills had been admitted to probate before the act of June 8, 1898, and no further legislation could affect that title.

II.

ESTOPPEL—THE FACTS.

It is admitted in this case that Charles H. Utermehle received from Sarah Utermehle, as executrix of George W. Utermehle, the sum of $2,116.88 on account of the bequest to him in his grandfather's will of a certain note and the interest thereon; that he took possession under that will of the Young law building and after collecting the rents thereof for about a year sold it for $20,000, claiming and using the rents and the proceeds of the sale as his own; that during the lifetime of Sarah Utermehle he received from her large sums of money, part of the personal estate bequeathed to her by the will of her husband, and that after her death and under her will he received further large sums of money from her executrices, which were also part of the personal estate which Sarah Utermehle had received under her husband's will.

It is also admitted that ordinarily one who takes a benefit under a will cannot controvert it. The questions of estoppel involved in this bill of exceptions grow out of matters set up by Charles H. Utermehle in the paper filed by him on November 3, 1900 (22–28), in reply to the claim of estoppel. In that paper he, in substance, avers:

1. That about May 19, 1900, he learned for the first time "of the true and infirm, mental and physical condition of his grandfather at the time of the supposed execution of said will and just learned also of the undue influence practiced upon the deceased by the said Rose M. Taylor and her husband;" that he then also first learned that Mrs. Taylor and

her husband had practically dictated and controlled the actions and business of George W. Utermehle during the last three years of his life; that during those three years George W. Utermehle was habitually intoxicated (23–24); that for about six years prior to his grandfather's death he had resided in Frederick, Maryland; and that just before and at the time of the death of his grandfather he had been in a poor state of health, and had during the last two or three years of his grandfather's life seen but little of him, "on account of which he had lacked the opportunity to become then acquainted with the habits or mental or physical condition" of his grandfather (23).

2. That immediately after the death of his grandfather he entered into a stipulatien or agreement with Sarah Utermehle and the petitioners, Mrs. Norment and Mrs. Taylor, to the effect that Sarah Utermehle "would by her will arrange matters justly and provide for respondent to receive ultimately as much of the estate of George W. Utermehle as each of the petitioners;" that immediately after the death of Sarah Utermehle he learned that by her will she merely provided for an equal distribution of what property she might die possessed of between the petitioners and himself, and that when she died she was in fact worth only about $200,000 (26); that before he had any opportunity to consult counsel he was taken dangerously ill and "confined to his bed in Frederick, Maryland, in a critical condition for a period of six weeks or more, after which, as a result of such illness, he remained in an impaired physical and mental condition for over two years," during which time his affairs in Washington were attended to by his agent, Charles W. Handy, he himself remaining during said period at his home in Frederick, "unable to transact or enter into business details;" and that when in November, 1899, after many years' residence away, he returned to Washington, he received certain information which placed him upon inquiry, and he then,

about May, 1900, learned "of the true conditions aforesaid and his legal rights in connection therewith" (26–27). In this connection it is also averred that after the death of George W. Utermehle, and before the death of Sarah Utermehle, the caveatees obtained from the latter a large part of her property (28).

3. That he had been "misled and purposely deceived as to his rights or as to what he might expect, by misrepresentations made by the petitioner Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment," and that about May 19, 1900, he "discovered the misrepresentation and fraud practiced upon him." In what the misrepresentation or fraud here relied upon consisted the caveator in his answer did not state.

4. That he was ignorant of his "rights" till 1900, when for the first time he was made acquainted with them (23, 24, 26, 27, 28, 29).

In discussing the matter of estoppel in this brief we will first consider the evidence on each of the foregoing propositions, and then take up the law of the case relating to that subject.

1. *As to the evidence in relation to the averment that in* 1900 *the caveator first learned of the alleged unsoundness of mind and habits of intoxication of the testator, and of the alleged undue influence and control of Dr. Taylor and Mrs. Taylor, and the alleged want of opportunity to learn these things at an earlier date.*

The averments of the caveator in his pleadings on this subject are exceedingly general. He states that for about six years prior to his grandfather's death he resided in Frederick, Maryland, and that just before and at the time of the

testator's death, he, the respondent, had been in a poor state of health and had, during the last two or three years of his grandfather's life, seen but little of him, so that he lacked the opportunity to become then acquainted with the habits or mental or physical condition of the deceased (23); that in May, 1900, he had discovered the true and infirm mental and physical condition of his grandfather at the time of the supposed execution of the will, and had then also just learned of the undue influence practiced upon him by Mrs. Taylor and her husband to secure the will; that Dr. and Mrs. Taylor had controlled the testator's actions and business during the last three years of his life, and that during that time the testator was habitually intoxicated (23–24).

His testimony on his direct examination was equally general. In answer to leading questions he testified that from 1889 up to some months after he returned to Washington, which was in 1899, he had no knowledge whatever with reference to the testamentary capacity of his grandfather, or with respect to any undue influence practiced upon his grandfather by Mrs. Taylor or any other person, or as to whether his grandfather was of sound and disposing mind when he made his will, or as to the alleged undue influence, fraud, duress, or coercion (66, 67).

His testimony as to his alleged discoveries just before bringing suit and filing his caveat are in substance that after a conversation between his mother and one Seth A. Terry, he, witness, went to see Terry; that his mother then went to see Mr. Lambert, and Mr. Lambert came up to the house, and that witness and Lambert then went to look over papers in his grandmother's estate in the orphans' court, and the papers in the case of Norment *vs.* Norment, and also in a certain case which involved the $750 note; that he read the papers in the latter case and glanced over those in the case of Norment *vs.* Norment, "and after looking at the facts testified to in the several cases," mailed a letter to Mrs. Norment and a letter to Mrs. Taylor, notifying them that he

denied the validity of the will and that he proposed to contest it (69). He further stated that he continued his search for information and facts, and interviewed many persons "from whom he learned quite a few facts in regard to his grandfather's capacity and in regard to his actions and a good deal about his drinking habits, and also he learned a good deal about his business relations with Dr. Taylor and his wife" (70). Nowhere is it stated what fact he learned, or from whom, in relation either to his grandfather's capacity, his actions, his drinking habits, or his relations with Mrs. Taylor and her husband.

Naomi Utermehle, the mother of the caveator, testified that in the fall of 1899 or early in the year 1900 she saw Mr. Terry, from whom she learned that the testator had asked for the payment of interest monthly on a certain loan on the ground that the money loaned belonged to the witness, and that it had to be paid promptly because it was part of her living. She further testified that she told her son about this; that her son went to see Mr. Terry; that in point of fact the testator did not have any money of hers to lend and did not make any monthly payments to her, and that her son went to see Mr. Terry, and that she saw Mr. Lambert and placed the matter in his hands (50). Terry was called as a witness for the caveator, but was asked nothing on this subject (158).

As to the alleged lack of opportunity on the part of the caveator, prior to 1900, to learn the alleged facts relied upon to defeat the will, the evidence was as follows:

The caveator's mother testified that he was born July 2, 1865 (44); that her husband, the caveator's father, died on January 4, 1867 (45); "that Charley always went to see his grandparents from the time of his father's death to the death of his grandfather and grandmother; * * * that after he got to be of some size he often stayed there all night, and when about eight or nine years old he very often went to see him on Friday or Saturday evening or Saturday morn-

ing and stayed until Sunday" (48). On her cross-examination she testified that during the winter of 1886 and 1887 (which was a few months before the will was executed) her son was with her in Washington a great deal, and that during that time he used to go to see his grandfather right often, possibly once a week; that he would say where he was going and would take his wife and baby with him and go out; that on these visits he would go at lunch time and take lunch and stay till late in the afternoon (51).

Her own relations with the testator and his family were broken off immediately after her husband's death, in 1867, by reason of a controversy and litigation between him and her growing out of the fact that he claimed as his own certain bonds which were in the son's possession at the time of the son's death, which claim she resisted (46–47).

The caveator himself testified to his constant visits to his grandfather's house from the time he was five or six years old until he went to Frederick to live, which was in 1882 or 1883. He said that before he went to Frederick he usually went to see his grandfather once a week, and sometimes oftener; that up to this time his relations with his grandfather were extremely pleasant; that during this period he rode around the city with his grandfather and went with him to the oyster wharf on Saturdays; that he was in the habit of going to his grandfather's on Friday afternoon and on Saturday, and that when he was from ten to fourteen years old he would go to his grandfather's house on Friday and stay until Monday; that he would eat at the table with his grandfather, and after supper they would play dominoes; that on Sundays he would go around the place with his grandfather; that as a rule he would leave Sunday evening at about 4 or 5 o'clock, but would sometimes stay to supper, and sometimes stay all night, and that this continued up to the time he went to Frederick (51–53).

On his cross-examination he testified that this went on

from the time he was about ten years old until he was about sixteen or seventeen (72–73).

The caveator further testified that in 1887 for about five months he was in Washington in the real-estate business, and that he was away from Frederick in the winters (60); that during the five months he was in Washington he was in partnership in the real-estate business here with a man named Newcomb, and that during 1887 he saw his grandfather possibly half a dozen times at his grandfather's house, where he would spend an hour or two, or something of that kind, or possibly take dinner (58). (The will in controversy was executed December 7, 1887).

On his cross-examination on this subject he said that during these five months in 1887 he went over to see his grandfather about half a dozen times; that he did not take meals there—he might have taken a meal there, but he was not positive of it; that on these visits he would stay a couple of hours; that it is likely that during that time he went to see his grandfather on two or three occasions with his wife and took dinner, and would stay around after dinner with the family; that he could not say this occurred on more than two or three occasions from February to June, 1887; and that during this period he went to see his grandfather about getting him to give him some plate-glass insurance, and also had a conversation with his grandfather about selling for him certain real estate in this city (75–110). He said that on the strength of this conversation he put the property in his partner's hands for sale, and that it never occurred to him at that time that his grandfather did not have mind enough to authorize the sale of the piece of property in question (110).

The caveator further admitted that he took Christmas dinner at his grandfather's house in 1887 and again in 1888 (77–78); that in 1888 he saw his grandfather possibly four or five times; that between December, 1888, and April, 1889, he went over to see his grandfather possibly once a

month, and that for two or three days just before his grandfather's death (which occurred April 16, 1889) he went to see him several times a day (59). He further stated that during the latter part of his grandfather's life he saw him on one or two occasions only on the street, and that then somebody was with him (62), and that to his knowledge his grandfather did not attend to any business after the spring of 1887; that in the spring of 1887 he did not seem to be attending to any business (71).

The evidence as to the caveator being in Washington after his grandfather's death and the opportunities he had to learn all about the alleged grounds of assault on the will is referred to below in another connection.

As to the alleged habitual intoxication of the testator and the caveator's opportunities for knowing of it, his mother testified that the testator "always drank; he always drank every morning; he drank early in the morning and he drank two or three times after that a day; that she noticed that he drank, as she supposed, a great deal; * * * that she continued to see a good deal of him down to 1867, when her husband died, and she noticed that he always drank; that he always kept it and always took pretty good drinks, and that whenever she went to the house he always drank" (49).

She further testified that her son would go at lunch time and take lunch with his grandfather and stay until late in the afternoon; "that he knew that his grandfather was always drinking, but she could not remember whether he ever said his grandfather was drunk or not" (51). She testified particularly to meeting Mr. Utermehle in the fall of 1882 in the office of Mr. Eugene Carusi, where there was a good deal of controversy between the parties, Mr. Utermehle taking part. She said at that time his face was very red, but she could not tell whether he was very drunk or very sober.

On this subject the caveator testified that up to May 13,

1883, when he went to Frederick, he noticed that his grandfather kept liquor in a room at the house, and had seen him at times take a drink; that he would go in the store-room at his house and get a drink and ask the witness on many occasions to go with him; that the witness formed an impression as a child that his grandfather was a person who took a drink when he wanted to, and that it was the regular thing in the morning for him to take a drink (57). He further testified that his only knowledge of his grandfather's style of drinking was that he kept this whiskey in this store-room and would go there, and that on every occasion that the witness took a drink with him his grandfather took a very large drink; that he would take a rather thin goblet, fill it possibly half full of whiskey and pour some water with it (61); that his (witness's) first drink of whiskey was taken with his grandfather, on the latter's invitation, some time between 1883 and 1887, and that this was possibly in 1885 or 1886 (110–111).

On his cross-examination the caveator admitted that on the occasions when he saw his grandfather in 1887 he would see him taking a drink, but said he could not say whether he was drunk or sober (76); that on Christmas day of 1887 (which was less than three weeks after the date of the will in controversy), when the witness joined the family in the Christmas dinner at his grandfather's house, he observed that his grandfather seemed to be drinking that day; that he could not say he was so drunk that he could not navigate, but that he was not able to carve the turkey to witness's satisfaction; that the witness himself took two drinks with his grandfather on that day and noticed that his grandfather was drinking more that day than at any other time (76–77). The dinner hour at Mr. Utermehle's house was in the middle of the day. The caveator testified that at the evening meal that day his grandfather did not appear, being apparrently upstairs; that he heard his grandfather come downstairs and some girl or woman went out into the hall and

got him and took him back upstairs; that nobody was upstairs that the witness knew of and he saw his grandfather at the bottom of the stairs in his night clothes; that the latter appeared to be under the influence of liquor that day (58–76–77).

The caveator having stated that his grandfather had his peculiar ways (52), he was asked, on cross-examination, to state what the peculiarities were; whereupon he stated that his grandfather seemed always to be peculiar in this—that when he was talking to any one he would not ask you for your opinion; he would tell you straight his opinion, and he would speak about something in that way; that he drove around and walked around the place; that he could not say that his grandfather was strongly of his own opinion; he simply expressed an opinion of something that he got his idea on; the witness could not say that it was his direct opinion; that as to the peculiarity in walking around his place, the witness had seen his grandfather trim rose bushes in the spring of the year and get his hands bleeding from thorns, which the witness supposed was peculiar, because the average person would put on gloves to cut rose bushes; that this happened on three or four occasions; that another peculiarity was that he sometimes got mad at his colored man for being late, and would get mad and jump into him; that he several times threatened to discharge the colored man, and once did, in fact, discharge him, but the colored man paid no attention to him; that his grandfather swore at the colored man in a combination of German and American, and that his grandfather would scold and swear at the colored man when he was late and the colored man would go on about his work (73). In this connection the witness further testified that he was afraid to ride around with his grandfather, because he did not drive with any care—was liable to run over somebody or somebody was liable to run into him; that he would sit in the vehicle, hold the reins, and let the horse go on one way or the other (61); that this occurred at

intervals from the time the witness was six or ten years old until the summer of 1882; that it was during this period that he discovered his grandfather's tendency to drive fast (72–73).

The caveator further testified that when he saw his grandfather in the spring of 1887 he noticed that the latter was failing in health; that he seemed to lack energy, was trembling, and walked more stooped than witness had seen him in previous years; that at dinner on several occasions at that time witness could not understand conversations between his grandmother and his grandfather because the latter was talking in German and seemed to get very excited; that he seemed to get excited very quickly, and would manifest it by talking about what he saw in the paper; that he would curse in a peculiar way that was his own; that he would get up and walk around and pull his hair, or, rather, his wig, and on one or two occasions pulled his wig off (60); that during the last eighteen months of his grandfather's life, from what the witness saw of him, he thought he was getting feeble; that, as to his physical condition, witness noticed that he was very much weaker and more decrepit, and that, as to his mental condition, when witness spoke to him about the plate-glass insurance, his grandfather replied: "All right, you write those policies and bring them over here," and that at that time his grandfather talked to him in regard to what he was doing in the real-estate business, and that all his grandfather said to him then was: "I have a piece of property over here in the country. If you can sell it, sell it" (61); that when he saw his grandfather on Christmas of 1888 his grandfather took no part in the Christmas dinner, and witness thinks he was in such a feeble condition that he would possibly be lying on the lounge; that he seemed to be in a feeble condition and did not seem to take an active interest in anything that day and did not give any indications one way or the other of being drunk; that between Christmas and April, when

his grandfather died, he saw the latter on two or three occasions and knew that he was in feeble health, and that he, witness, "kept in touch with Washington at all times" (78).

As to the relations between Dr. and Mrs. Taylor, the caveator testified that when he was staying over Sunday with his grandfather they would generally come over on Sunday and take dinner or tea (52); that he knew Mrs. Taylor acted as clerk for her father and looked after his writing (67); that he frequently saw his grandfather's buggy standing in front of Dr. Taylor's house (61); that on the occasion of his visits to his grandfather's house Dr. and Mrs. Taylor almost always talked with his grandfather about business—"some rent, or something about the rent; something about a tenant that had not paid his rent, or something about making repairs on property;" that they "made suggestions to Mr. Utermehle that it would be well to do so and so in the way of repairing or in reference to a loan" (57), and that he had no knowledge as to the conversations between Dr. and Mrs. Taylor and his grandfather except what he overheard between them as to loans (67).

The foregoing is a summary of the evidence offered by the caveator to support the claim made in his pleadings (23, 24) that for about six years before his grandfather's death he, the caveator, had resided in Maryland and had no opportunity to become acquainted with the habits or mental and physical condition of the testator or his relations with the Taylors. Comment would seem to be unnecessary.

2. *The evidence in relation to the alleged contract with Sarah Utermehle and the caveatees, the alleged breach of that agreement, and the excuse made for not taking action for its rescission promptly after the death of Sarah Utermehle.*

The only witness to the alleged agreement between the caveator on one hand and Sarah Utermehle and the cavea-

tees on the other was the caveator himself. He testified that on the day of his grandfather's burial, after the return from the funeral, Mr. William R. Woodward read to the parties in interest, including himself, his grandfather's will; that at Mrs. Taylor's request he went to the house the next day and there met Mrs. Taylor and Mrs. Norment and his grandmother; that Mrs. Taylor did all the talking, his grandmother and Mrs. Norment acquiescing in what Mrs. Taylor said, and that she said "his grandmother was left all the personal property, which amounted to almost, if not quite, equal to what they had received, and that when she died she proposed to make him right—to make him equal with them by equalizing his share; and, further, she wanted to know what the mortgage on his farm was, as she wanted to pay it off" (62–63).

He further testified on his direct examination that between the death of his grandfather and the death of his grandmother he did not do any act to attack his grandfather's will because of this promise made the day after the funeral (66).

On his cross-examination he substantially repeated this statement and added that Mrs. Taylor said "that pap had left his money in that way intending that she (the grandmother) should take care of him;" that the inference witness drew from the conversation was that there was an understanding with his grandfather that witness should be taken care of by his grandmother out of the personal estate; that while Mrs. Taylor might not have used this exact language, that was the natural inference to draw from what she did say (95).

On further cross-examination the caveator was asked whether he agreed to do anything as a consideration for the promise to which he was referring, and he replied:

"It was a promise on their part, and I considered that my action at that time was in the nature of an agreement.

"Q. What do you mean by that?

"A. My action in not making any effort, or in other words, in remaining perfectly quiet and still, making no effort to ascertain anything about the condition of my grandfather's estate, or my rights under it" (97).

Being pressed further on this subject, after stating that there was nothing said at the time about his not attacking the will, the following occurred:

"Q. Was there anything said, in substance, by them or by you that this was an understanding that they would make this promise if you would not attack the will?

"A. There wasn't anything said about my not attacking the will at that time. * * * The conversation was said, and I said, 'Well, that's all right. I will do that.'

"Q. You meant by that that if you would be made whole out of your grandmother's estate when she died, you would accept the situation?

"A. I looked upon that as being an agreement, and I was willing to leave it to it—willing to stand by it" (98).

Further on he admitted that when he went to the office of the register of wills, shortly after the death of his grandfather, and signed the waiver of citation (21), he had entered into this arrangement with his grandmother and his aunts that they would see him made whole when his grandmother died, and he told them that it was all right, and that he didn't intend to make any trouble or opposition, and that it wasn't necessary to induce him to go there and sign that paper, as he had already agreed to let things go (105).

In the paper filed in this case by the caveator on the 3d of November, 1900, in which he sets up his reply to the claim of estoppel, he avers that the personal estate which went to Sarah Utermehle under the will of George W. Utermehle was more than $300,000, "and that she was worth more nearly $600,000 or $700,000" (25). In his testimony he said that he thought that when the promise referred to was made his grandmother had a good deal more than $600,000 or $700,000 of personal property—that in his opin.

ion it should be put she had a million dollars worth of personalty (98–99–80–81).

It was conceded at the trial of this case that the real estate of which George W. Utermehle died possessed was worth about a million dollars (118). Assuming, as the caveator testified, that the personal estate was worth as much, he was worth about two million dollars in all. The caveator's share of this, if there had been no will, would have been $666,666.66. There was, therefore, according to this evidence, ample personal property when the alleged promise was made to have enabled Sarah Utermehle to comply with the alleged promise by making her grandson equal with her daughters as to the whole estate.

The caveator in his pleadings admits that immediately after the death of his grandmother in 1893 he was informed she had died a "comparatively poor woman," and that he was surprised and pained to find that no regard had been made by either his grandmother or his aunts for their alleged pledge or agreement to equalize his share as one of the heirs-at-law of his grandfather (26–27).

In his direct testimony he states the same thing in substance, and says that Mrs. Taylor said to him that there was no use in discussing it, that his grandmother had given to charity, and to this and that, and that he thereupon remarked, "Well, I guess I will have to stand in [it]—this will is a very great surprise to me, and I presume it knocks me out entirely, something I didn't anticipate" (68).

On his cross-examination he again still more explicitly admitted that immediately after the death of his grandmother, by statements made to him by Mrs. Taylor and by hearing his grandmother's will read, he knew that the alleged agreement with him had not been kept and could not be kept (89). Further on he says that he told Mrs. Taylor about this time, "I never made but one mistake in my life, and that was when I held still once before and now I have got to stand still" (101).

The caveator also admits that after his grandfather's death his grandmother "lent" him $20,000 (66). This is one of the advances referred to in Sarah Utermehle's will, and it was charged to him in the settlement of her estate (92). Further testifying, he said that his grandmother on another occasion sent him a check, which might have been for $500 or for $5,000, and which was not charged to him in the settlement of her estate (66). On his cross-examination he referred to this check as one for "$5,000 or $6,000 and something" (93). He admits that with money received from his grandmother, Sarah Utermehle, shortly after his grandfather's death, he paid off a mortgage on his farm in Frederick, Maryland (113), and that he used the $20,000 in buying a hotel at Frederick (93).

In his pleadings the caveator stated that for over two years after the death of his grandmother all matters connected with the management and settlement of his property interests devolving upon him as one of the heirs-at-law or alleged devisees and legatees of Sarah Utermehle were attended to by his agent, Charles W. Handy, a real-estate broker in Washington (27). In his testimony in the case he said that he had come into contact with Mr. Handy from 1889 on, and that Mr. Handy had attended to what little business he had from 1890 on (84).

On May 5, 1893, the caveator executed and delivered to Handy a power of attorney, which in effect authorized Handy to represent him in all his business matters, and which specifically gave Handy full power and authority for the caveator and in his name "to employ and consult counsel learned in the law in all matters and things relating to my real and personal property and estates, and to commence and prosecute any actions in any courts having jurisdiction when in his judgment and discretion it may be advisable so to do, in relation to the matters hereinbefore mentioned" (82).

On his cross-examination, when shown certain papers

which he had signed and as to which he said he had no recollection, he explained this by saying that he executed papers on many occasions for Mr. Handy when Mr. Handy told him to do it (108). He further testified that he did not know whether or not Handy under that power of attorney employed counsel to represent him in the estate of Sarah Utermehle (83). Handy was examined as a witness in the case on behalf of the caveator, but no question was asked him as to this power of attorney or as to anything he had done under it (115).

The caveator further testified that Mr. Eugene Carusi, a well-known member of the bar in Washington, had always been a friend of his, and that in dealings with the executrices of the will of Sarah Utermehle, Mr. Carusi was acting for the witness in a friendly way (84). On June 6, 1893, Mr. Carusi addressed a letter to William R. Woodward, the attorney for Mrs. Taylor and Mrs. Norment, in which he said: "I am authorized by my client, Mr. Charles H. Utermehle, to give notice to you as counsel for the executrices of the late Sarah Utermehle that he insists that all the overdue notes held by him [them] be forthwith converted into money by enforcing the deeds of trust by which they are secured" (85). Mr. Carusi witnessed the signature of Charles H. Utermehle to the waiver of citation when the will of Sarah Utermehle was offered for probate (120).

In consideration of this waiver and in consideration of the consent of Charles H. Utermehle to the probate of the will of Sarah Utermehle, the executrices agreed to charge or receive no commissions as such executrices (122.) This was the result of a claim set up by the caveator that he had a right to be an executor with the executrices (84). He testified that it was finally "arranged all right—that they agreed to serve without commissions;" that this agreement, he thinks, was made with Mr. Carusi and Mr. Handy; that he had a perfect right to be an executor, and that he thinks in view of that Mr. Carusi arranged that matter for him,

"but that was, you might say, a friendly act" (94). "Our proposition," the caveator testified, was "not that they were to serve as executrices without commission, but that I was to be made a co-executor with them—to be put on an equal footing with them" (84). He further stated that he thought, but he was not absolutely certain, that he was informed by Mr. Handy or Mr. Carusi that the executrices had agreed to waive their commissions (85).

Immediately after the death of Sarah Utermehle the caveator was informed by Mrs. Taylor and Mrs. Norment that their mother had expressed some wishes in regard to the disposition of part of her estate which were not contained in her will. He testified that he probably told them that it would be all right; that he thought one of these things was a gift of $500 to Louisa Smith, but he was not positive of it. Indeed, he testifies that at this time, in a conversation "in regard to those little furnitures and things" his grandmother had given, he said to Mrs. Taylor: "You can give it all away, so far as I am concerned. I have got the worst of it, and I have got to stand it" (101). And by a paper which was filed in the court, signed by Mrs. Taylor and Mrs. Norment in person and by the caveator by Charles W. Handy, his attorney-in-fact, the executrices were exempted from further accounting for certain of the personal property of Sarah Utermehle, including a horse and carriage given to a minister in accordance with the expressed wish of Sarah Utermehle; a certain promissory note for $500 given to Louisa Smith, as requested by Sarah Utermehle, and certain wearing apparel, furniture, china, silverware, fixtures, and a horse and buggy (120–121).

In December, 1893, the caveator, to secure the payment of an indebtedness of $12,000, gave a deed of trust on the one-third interest in square 765, in Washington, devised to him by his grandmother, and to secure the payment of an additional sum of $15,000 he gave another deed of trust on the same interest in 1896 (109). Under these deeds of trust,

or one of them, his interest in that property was sold for the sum of $13,500 (69).

The caveator testified that in addition to this he got from his grandmother's estate about $60,000 (69). It was admitted at the trial by counsel for all the parties that the account of the executrices of Sarah Utermehle showed that after the payment of certain small debts and legacies the estate was divided into three parts, and that the caveator and his aunts, as next of kin, each received one-third part thereof, each receiving some $84,256.87, either in money, securities, or property, leaving a small amount for further distribution (122).

The various amounts received by the caveator, either directly from the estate of his grandfather or indirectly through his grandmother, are shown by the evidence in this case to be as follows:

From the Estate of George W. Utermehle.

Legacy (5–65–81)	$2,116.88
Young Law building (66–90)	20,000.00
	$22,116.88

From Sarah Utermehle in Her Lifetime, not Including the $20,000 Loan.

Check, May 9, 1889 (81)	$6,566.66
Check (see testimony of caveator, 65)	5,000.00
Check (see testimony of caveator, 66–93)	5,000.00
	$16,566.66

From the Estate of Sarah Utermehle.

Check, April 25, 1889, to Charles W. Utermehle (86)	$770.9
Check, April 25, 1889, to Charles W. Handy, attorney (86)	229.1
Check, June 16, 1893, to Charles H. Utermehle (87)	5,000.0
July 1, 1893, distributive share of promissory notes and interest (92)	77,864.6
Receipt, November 18, 1893, by Handy (90)	1,300.0
Check, June 29, 1894, to Charles H. Utermehle (88)	60.2
Receipt, November 6, 1894, to Charles W. Handy (87)	3,993.5
Receipt, August 4, 1899, by Handy (87)	1,000.0
One-third interest in square 765 (93)	13,500.0
	$103,718.3

Summary.

From estate of George W. Utermehle	$22,116.8
From Sarah Utermehle during her lifetime	16,566.6
From estate of Sarah Utermehle	103,718.3
Total	$142,401.91

It will be observed that the last of these payments was made on August 4, 1899, about three months before the caveator began to consider the matter of assailing his grandfather's will. The evidence does not disclose that anything further remained to be distributed.

We come next to the consideration of the excuses given by the caveator for taking no action in this matter from the time he acquired full knowledge of the alleged breach of

contract just after the death of his grandmother, in March, 1893, till June, 1900.

In his sworn answer, which was filed in the case on November 3, 1900, after admitting that he was informed immediately after the death of his grandmother that the alleged agreement with him with reference to equalizing him with Mrs. Taylor and Mrs. Norment in his grandfather's estate had not been kept and could not be kept, the caveator said that before he had any opportunity to consult counsel he became dangerously ill and was confined to his bed in Frederick in a critical condition for six weeks or more, after which, as a result of that illness, "he remained in a greatly impaired physical and mental condition for over two years, during which time all matters connected with the management and settlement of his property interests, including those devolving upon him as one of the heirs-at-law or alleged devisees and legatees of Sarah Utermehle, were attended to by his agent, Charles W. Handy, * * * your respondent continuing during said period to be unable to transact or enter into business details, remained at his home in Frederick without being advised of the matters and things aforesaid affecting the validity of the alleged will of George W. Utermehle * * * until November, 1899, when after many years' residence away he returned to the city of Washington" (27).

On his direct examination, after testifying that he learned from the reading of his grandmother's will and from what Mrs. Taylor told him that he was to receive only about one-third of $200,000 from her estate, he said that he was completely knocked out and did not know what to say; that he went back to Frederick a few days after that "and not long after that was taken sick with rheumatism and never came back to Washington to attend to any business in regard to his grandmother's estate, or anything of the kind;" that he executed a power of attorney to Handy to attend to all these matters, who gave receipts for all moneys turned over to

him in the transaction; that he did not then put the matter into a lawyer's hands because he kind of thought he could not get much out of the will of his grandmother, and that his grandfather's will was so far back that he could get nothing; that he was indifferent and lost heart; that his health was bad at the time and he had other troubles and things; that he was sick in bed with rheumatism for possibly five or six weeks and was really for eighteen months after that more or less subject to limping and walking around and having pain, rheumatism, and so on; that he was sick for possibly eighteen months and did not entirely recover from the rheumatism until 1895; that in 1893 he was drinking to some extent, more so than he had been previously; that for a year or more he had financial trouble, as well as trouble in private affairs, and that he was never able to take active charge of his affairs until he took charge of the City Hotel (in Frederick) in 1895 (68–69).

On his cross-examination the caveator said that in April, 1889, when he signed the waiver of citation in the matter of his grandfather's will, he was not feeling very good; that possibly he had taken a couple of drinks that day (105–106); that he went to Frederick ten or fifteen days—he could not say definitely—after his grandmother's death in 1893, being backwards and forwards between Frederick and Washington during that period of ten or fifteen days (83); that in 1893 his wife and children were living at the farm in Frederick, and, he believed, at Atlantic City for a while; that during the same period he was in Washington and at different places; that when he was in Washington he was living at his mother's; *that in July, 1893, he went to Detroit to a reunion of the order of Elks, and also went to Chicago to the World's Fair, and came back by way of New York and Atlantic City and Philadelphia; that this trip lasted ten or fifteen days; that in the last six months in 1893 he was in Philadelphia on several occasions, where he went to buy horses; that during the same period he was at the Rockville fair and, he*

believed, at the Hagerstown fair, and that he went to both fairs, in the horse business, to show horses; that he went to Baltimore on two or three occasions in 1893 on the same business, and that during the six months which followed the death of his grandmother, after he got over the rheumatism, he was attending to the horse business in Philadelphia, Rockville, Hagerstown, and Baltimore. Upon being reminded by cross-examining counsel that this was the time when he said in his replication, as an excuse for not attending to business, that he was sick, the witness replied: "I was sick, so far as attending to business was concerned. I could attend to the horse business all right, because that didn't involve any particular amount of business;" that it does not take a very good business man to deal in horses, and *that during this time his headquarters were in Washington, where he was living with his mother, at 1132 Twelfth street* (104).

Being pressed as to why he had sworn that after his grandmother's death he had had no opportunity to consult counsel because he was stricken dangerously ill, he said:

"I understood at the time that paper was written that that was more a figure of speech than anything else" (103).

It further appeared on the caveator's cross-examination that he dealt a good deal in horses all the time from 1884 or 1885 until 1895; that during this period of about ten years he bought and sold horses; that he was buying and selling horses for profit and not simply to work on his farm; that he was in this business off and on for about ten years, but sometimes would not do anything at it for six or eight months; that he dealt between Washington and Frederick and other places, but generally to a greater extent between here and there; that he had no special place of business; that he was on 8th street for a long while, and then sometimes on 8th street and sometimes on G street; that he would put up at a livery stable when he would come in with some horses; that he would get some horses together and

before he would start them out to Frederick would leave them at a stable; that on the day the citation was served on him at Fagin's place he had been at Fadeley's stable, and that the instructions at Fadeley's stable were that any time he was not there and was not out driving during the daytime, they could find him at Fagin's (93–94).

He further testified that two years or more before he testified he had asked for the power of attorney which he had given Handy in 1883, and that he understood that the paper was virtually out of existence a long time before, after the witness got on his feet and got back here to Washington and got to attending to his own business (83).

In the deed of trust which was executed by the caveator December 29, 1893, it was recited that he was then unmarried (109). His relations with his wife had been terminated by a divorce (112). The divorce suit was pending in December, 1893 (112). He admitted that he was not on the farm where his family lived between the early part of August, 1893, and the end of that year, and was not positive whether he was in Frederick at all during that period (113). How he was really engaged in Washington when he was not attending to his horse business or making excursions over the country may be inferred from his cross-examination as to his relations with a man named William L. Rose (111–113).

Thus the statement of the caveator that for seven years after his grandmother's death, in 1893, he was prevented by illness and absence from Washington from taking steps to assail his grandfather's will or enforcing his alleged contract with his grandmother was shown out of his own mouth to be without the slightest foundation in fact.

3. *The evidence relating to the alleged misrepresentation and fraud.*

In answer to the petition of the caveatees, offering the will of their father for probate as a will of real estate, the caveator

states that he was "misled and purposely deceived as to his rights, or as to what he might expect, by misrepresentation made by the petitioner, Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment;" that in May, 1900, he discovered "the misrepresentation and fraud practiced upon him by petitioners" (23), and that his grandmother and the caveatees well knew that the legacy of the $750 note to him was merely an artifice intended to deceive the caveator (25).

No attempt was made to prove the averment of knowledge on the part of the grandmother or of the caveatees, or either of them, of any supposed artifice with reference to the $750 note.

As to the misrepresentation so vaguely charged, the caveator testified on his direct examination that immediately after his grandfather's death, in the presence of and with the acquiescence of his grandmother and Mrs. Norment, Mrs. Taylor told him that the personal property was almost if not quite equal to what they had received (63). On his cross-examination the above-quoted paragraph from his answer was read to him, and he was asked to state what the misrepresentations were that he there referred to. He answered: "Misrepresentation of the fact of the amount of personalty that was left to me, or rather the amount that was left to my grandmother under the will; the fact that she did not carry out the promise that was made to me, * * * so that at her death I would be equalized with the other two" (94). Being pressed further whether this was all, he said: "The substance of what she [Mrs. Taylor] said was that the personal estate that had been left to my grandmother under the will was almost, if not quite, equal to all of the real estate that was left to them," and that the substance of what Mrs. Taylor said was that under an arrangement that had been made between his grandfather and his grandmother he, the witness, was to be taken care of out of the personal estate (95).

The further cross-examination on this subject is too long to be set forth here, but will be found in full on pages 95 to 99 of the printed record.

It will be seen that the caveator was compelled to admit, and did admit, that there was no misrepresentation made to him at all; that so far as he knew and believed, after all the alleged discoveries which he had made, the personal property which his grandmother received was sufficient to have enabled his grandmother to give him an equal share with Mrs. Taylor and Mrs. Norment of the estate of his grandfather. There was no other testimony on the subject. The whole case for the caveator in this connection dwindled to the alleged promise of his grandmother to equalize things at her death. If that promise was ever made it was broken when she died. A promise is not a representation, but a contract (2 Pom. Eq. Jur., 808). The caveator's remedy assuming his story to be true, was by an action against her estate. That action was barred in three years from the date of her death (Abert's Comp. 360). This consideration alone is fatal to the case of the plaintiff in error.

Before entering upon the consideration of the authorities bearing upon the questions of law raised by the evidence hereinabove referred to, it is important to refer to the *changes in the situation of the caveatees and others during the period from 1889 to 1900, when the caveator was taking benefits under the will of his grandfather.*

George W. Utermehle died April 16, 1889 (1), and his will was admitted to probate April 26, 1889 (2). The first intimation of the caveator's intention to dispute the will was his letter to Mrs. Taylor and Mrs. Norment of May 19, 1900 (69), more than eleven years after the caveator had appeared in the probate court and in writing informed the court that he waived citation and consented that the court might act on the petition for probate without further notice to him (21).

In the meantime the widow, who was the principal person interested in sustaining the will, both as executrix and as a party in interest, had died. Mrs. Taylor died before the case could be reached for trial. (Her deposition was taken, but the impossibility of anticipating the evidence of the caveator and his witnesses is obvious.) Of the three witnesses to the will, two had departed this life, and the other had been stricken with paralysis (42). Of course, in the eleven years that elapsed between the death of the testator, in 1889, and the filing of the first caveat, in June, 1900, many persons who knew him had passed away, and the recollection of surviving witnesses had become dim. Mrs. Taylor and Mrs. Norment had allowed their mother, the executrix, to take possession of the entire personal estate, admitted to have consisted of several hundred thousand—possibly a million—dollars, upon a nominal bond which did not require her to account for the same, or even to file an inventory thereof (3). A part of this personal property—how much can never be known—the widow gave away to charity (26). As executrix she filed no inventory or account (118). She simply reported to the court that she had paid all the debts of the deceased which had come to her knowledge and had paid the legacies in full. Among these legacies was $9,000 which had been paid to persons who were not entitled to receive anything unless the will was valid (4). The widow, accepting the personal property, had given up her dower interest not only in the Young law building, but in all the real estate of her husband except square 765. Of that square she had taken possession as owner and her right thereto was acquiesced in by both Mrs. Taylor and Mrs. Norment.

The will required that Mrs. Taylor and Mrs. Norment should divide the real estate (except square 765) between them. If either objected she forfeited her entire interest with the exception of five dollars. Relying upon the will standing and complying with this requirement in July, 889, they made a division between them of the numerous

parcels included in the devise (123–127), except a few parcels which it was found necessary to sell for the purpose of partition (157). Mrs. Taylor prior to April had sold to third persons some of the parcels which went to her in the division to the value of $40,000 (157).

The parcels which went to Mrs. Norment in the division were conveyed by her and her husband to Job Barnard, trustee, in July, 1899, and at the same time the trustee conveyed the same to Samuel Norment (127–128). Mr. Norment died in March, 1891, seized of a large estate, which by his will was devised to trustees upon certain trusts for the benefit of his wife, his children by that wife, and his children by a former wife. In April, 1892, Mrs. Norment filed a bill in equity against the trustees and all the children, two of whom were minors, in which she charged that the property which came to her from her father had been transferred to her husband under an agreement between her and her husband by which she was to have at his death one-third of his entire estate absolutely, and that by his will he had given her only a life interest in one-third of his estate. She sought by the bill to have the court require the trustees to convey back to her the real estate which had been devised to her by her father (128 to 140). The adult defendants filed an answer in which they denied the principal averments upon which the complainant based her prayer for relief (141 to 151). In February, 1895, all the adult parties to the suit entered into a written stipulation of compromise of the matters involved in the litigation, which was, however, subject to the condition that if it should not be approved by the court as to the infant defendants it should be void (153–155). Thereupon a final decree was made in the case ratifying the compromise as to the infant defendants and making the compromise agreement binding upon all the parties (156). The effect of this proceeding was that a part of the real estate which Mrs. Norment had received from her father and had

conveyed to her husband was vested back in her, the title to the remainder of the property being left in the trustees under the will of Samuel Norment for the benefit of the other parties to the cause, including Mrs. Norment's two minor children. Mrs. Norment was deprived in this way of any interest in the real estate of her husband other than that which he had derived from her. It is manifest that if the caveator should now be allowed to reach a one-third interest in the real estate of his grandfather which entered into this compromise, it would be impossible to put Mrs. Norment or any of the other parties to that litigation *in statu quo*. And it should be noted that in the evidence there is not a word reflecting in the slightest degree upon Mrs. Norment. It is indeed said (63) that she was present and giving silent acquiescence when the alleged agreement was made between the caveator and his grandmother (through Mrs. Taylor) about equalizing his share in his grandfather's estate, but there is nowhere anything indicating that she had any knowledge or belief that the alleged promise then made could not be carried out, or that she had anything to do with its not being carried out, and the charges made in the pleadings of undue influence and coercion are directed against Mrs. Taylor and her husband and not in any degree against Mrs. Norment.

Even as to Mrs. Taylor, while it is averred in the pleadings that she exercised undue influence upon her father, and that he was under the control of her and her husband, there was no offer to prove anything specific against her or her husband (159).

It must be remembered, too, that since the death of Sarah Utermehle, in 1893, there has been no representation of the estate of George W. Utermehle. On the assumption that all the parties in interest had accepted the will of her husband, she, as his executrix, wound up his estate by paying all debts and legacies and distributing the entire personal estate. When she died there was apparently no necessity for further administration and none was had. If, now, the will of

George W. Utermehle should be set aside, how would it be possible to have administration *de novo* of his personal estate? Consider the practical impossibility of doing justice to the caveatees alone in such a belated administration. Their grandmother took the entire personal estate under the will, except the $9,000, which she paid to relatives in Germany, and the two thousand and odd dollars paid to the caveator. The latter, as we have seen, testifies that, in his judgment, that personal estate amounted to a million dollars. It may have amounted to twice that sum. The widow was not required to account for it. She is dead and an inquiry into the subject now would be unavailing; and if such an investigation should be made and it should be ascertained that the personal estate amounted to only $700,000 or $1,000.000, how are the caveatees at this late day to get their share of it? It appears, indeed, that each of them received about $84,000 from that source, but this is only a part of what they would be entitled to. The caveator says in his answer to the claim of estoppel that his grandmother's estate was reduced by "bequests made by her to charity" (26). No one can tell now how much of it was disposed of in that way, and if the amount were ascertained the gifts could not be recalled. In short, a new administration now of the estate of George W. Utermehle is impossible. The Court of Appeals, indeed, held that it was an irregularity to permit the contest to go on, so far as the personal estate of the testator was concerned. Whether this is a correct view of the matter may be questioned, but it is a matter of little consequence to the defendants in error, since manifestly if the will were set aside *in toto* it would be impossible for them to recover their share of the personal estate which Sarah Utermehle disposed of to third persons during her life. The three years bar of the statute of limitations would protect the recipients of her bounty.

Moreover, the caveator, instead of bringing suit on his grandmother's death to enforce his alleged contract with her,

actually claimed the right to be one of the executors of her will! And even that claim he waived in consideration of the executrices giving up their claim to commissions on her estate, which would have amounted to from $12,000 to $24,000 (84, 85, 94, 122).

He went further by authorizing the executrices, unsuspicious of any such claim as he now sets up to carry out the wishes of his grandmother, verbally expressed, by giving up a consideruble part of the personal estate to Louisa Smith and others.

In all these several ways the plaintiff in error precluded himself from disturbing the distribution of his grandfather's personal estate. He thereby made it impossible to put Mrs. Taylor and Mrs. Norment *in statu quo*, and so is precluded from assailing his grandfather's will at all.

III.

ESTOPPEL—THE LAW.

The caveator is to be charged not only with what he actually knew in regard to the physical and mental condition of his grandfather and the alleged undue influence, coercion, misrepresentation, and fraud, but with the knowledge he could have acquired by the use of reasonable diligence—especially as to matters concerning which what he did know would have led a man of ordinary prudence to make further inquiry.

We have seen that the caveator was quite intimately associated with the testator down to 1883; that from that time on he visited his grandfather at least several times a year at the latter's house; that from February till June, 1887, he was in business in Washington, and frequently saw his grandfather, taking meals at the latter's house and dealing with him in business matters; that he spent half of Christmas day of 1887 and 1888 at his grandfather's house, receiv-

ing presents from him on both occasions; that these visits continued through January, February, and March, 1889, and occurred several times a day in his grandfather's last days, in April, 1889; that he knew his grandfather's alleged feebleness in 1887, and knew also his alleged eccentricities and constant habit of drinking liquor, sometimes to excess; and that he knew in a general way of the close business relations between Dr. and Mrs. Taylor and his grandfather.

He knew also that he was one of his grandfather's heirs, and that he had a right to contest the will, for in reply to a question from his own counsel he said that the reason he did not attack it at once was because of the alleged promise made by his grandmother the day after her husband's funeral (66). Finally, he knew in March, 1893, that that alleged promise had not been kept, and that the "equalization" which he says he had been led to expect would not be made.

The first question is whether under these circumstances he could remain passive till 1900 and then assail the will of his grandfather on the ground that he had just discovered evidence of unsoundness of mind, undue influence, &c., which was unknown to him before. This question would hardly seem to require much discussion, but we will invite the attention of the court to a few leading authorities on the subject.

One who became a stockholder in a corporation upon a false representation by an agent of the corporation that he would have to pay only 20 per cent. of the face value of the stock for which he subscribed was held bound to pay in full. The court lays stress upon the fact that he had allowed three years to elapse, and says of one in such a situation:

"He certainly is bound to use care and attention to ascertain his position and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it."

Upton, assignee, *vs.* Tribilcock, 91 U. S., 55.

Where the purchaser of mining property sought to be relieved from the purchase on the ground of fraud, the court, speaking of the necessity for prompt action on the part of one who wants to rescind an action on the ground of fraud, says:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

Grymes *vs.* Sanders, 93 U. S., 55, 62.

"The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

Wollensak *vs.* Reiher, 115 U. S., 99.

When a depositor in a bank failed to seasonably examine his pass book and returned checks, whereby the frauds of his clerk remained undiscovered for several months, it was held that the depositor and not the bank must bear the loss. The clerk raised a number of checks after the depositor had signed them. These checks bore date from September, 1880, to February, 1881. The depositor did not discover the forgeries until early in March, 1881. The case was tried in the United States circuit court for the southern district of New York. That court instructed the jury to find a verdict for the depositor against the bank on the ground that a bank is responsible if it pays forged checks of its depositors. But this court reversed the judgment, and held that the depositor was estopped to set up the forgeries, the court saying, by Mr. Justice Harlan:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the considera-

tion of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In Morgan *vs.* Railroad Company, 96 U. S., 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In Continental Bank *vs.* Bank of the Commonwealth, 50 N. Y., 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that where there is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylord *v.* Van Loan, 15 Wend., 308.' The general doctrine, with proper limitations, was well expressed in Freeman *v.* Cooke, 2 Exch., 654, 663, and in Carr *v.* London & Northwestern Railway Co., L. R., 10 C. P., 307. In the first of those cases it was said by Parke, B., for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state

of facts referred to did not exist.' See also Manufacturers' & Traders' Bank *v.* Hazard, 30 N. Y., 226, 229; Blair *v.* Wait, 69 N. Y., 113, 116; McKenzie *v.* British Linen Co., 6 App. Cas., 82, 101; Miles *v.* McIlwraith, 8 App. Cas., 120, 133; Cornish *v.* Abington, 4 H. & N., 549, 556."

* * * "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that, where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has the means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the supreme court of Ohio in Ellis & Morton *v.* Ohio Life Ins. & Trust Co., 4 Ohio St., 628, 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception."

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 108, 112, 122.

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands not only that he shall have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

Foster *vs.* Mansfield, &c., R. Co., 146 U. S., 88–102.

When laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.

Johnston *vs.* Standard Mining Co., 148 U. S., 360.
Johnson *vs.* West India Transit Co., 156 U. S., 618.

When a party desires to rescind a contract under which he has received property on the ground of mistake or fraud, he must, upon discovering all the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection. The court cites and reaffirms the extract from Grymes *vs.* Sanders, hereinabove set forth, in connection with that case.

McLean *vs.* Clapp, 141 U. S., 429.

Silence alone of the adverse party will not excuse the plaintiff's laches.

Wood *vs.* Carpenter, 101 U. S., 135–143.
Felix *vs.* Patrick, 145 U. S., 317, 331.

2. *Under the circumstances of this case the mere lapse of time has raised an insurmountable obstacle to an attack by the caveator upon his grandfather's will.*

Attention has already been called to the great injustice that will be done the caveatees if at this late day it should be adjudged that their father died intestate (*ante*, p. —). It has not been charged, nor was any evidence offered to prove, that the caveatees or either of them used any means to prevent the caveator from ascertaining the facts surrounding the execution of their father's will or his mental condition at that time. We think no case can be found where in such a situation an heir has been permitted to lie by for ten or

eleven years and then bestir himself and assail the will of his ancestor. The cases to the contrary are numerous and convincing.

"In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence."

Hammond *vs.* Hopkins, 143 U. S., 224–274.

On the same subject this court said in Galliher *vs.* Cadwell, 145 U. S., 368, 372, 376:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

"A reference to a few of the cases in our own reports may not be out of place. In Harwood *v.* Railroad Co., 17 Wall., 78, a delay of five years on the part of stockholders in a railroad company in bringing suit to set aside judicial proceedings, regular on their face, under which the railroad company was sold, was held inexcusable. In Twin-Lick Oil Company *v.* Marbury, 91 U. S., 587, a director of a corporation who had loaned money to it and subsequently bought its property at a fair public sale by a trustee was protected in his title as against the corporation, suing four years thereafter to hold him as trustee of the property for its benefit, it appearing that in the meantime the property purchased had increased rapidly in value. In Brown *v.* County of Buena Vista, 95 U. S., 157, a county was held barred by its laches from maintaining at the end of seven years a suit to set aside a judgment fraudulently obtained against it; and that, too, though it

did not affirmatively appear that the supervisors of the county had knowledge of the existence of the judgment till about twenty months before the commencement of the suit. In Haywood *v.* National Bank, 96 U. S., 611, a party who had borrowed money of a bank and deposited with it as collateral security certain mining stocks, which were sold by the bank upon his failure to repay the loan, was held barred by his laches in a bill to redeem, filed four years thereafter, the stocks in the meantime having greatly increased in value. In Holgate *v.* Eaton, 116 U. S., 33, a married woman who, on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiated it and refused for two years to perform it, was not permitted thereafter to maintain a bill for specific performance of the contract, the value of the property having depreciated. In Davison *v.* Davis, 125 U. S., 90, a bill to compel the specific performance of a contract to sell personal property upon the payment of a promissory note, payable at a date after the making of the contract, was dismissed on the ground of the laches of the complainant in waiting five years after the maturity of the note before filing his bill, the property in the meanwhile having increased in value. In Societe Fonciere *v.* Milliken, 135 U. S., 304, a delay of two years in the commencement of proceedings to set aside a judgment for usury was adjudged fatal, the amount of the usury being small, and the judgment having been enforced in the meantime by the sale of real estate."

In Simmons *vs.* Burlington, &c., R. Co., 159 U. S., 291, the following passage from 2 Pomeroy's Eq. Jur., sec. 965, is quoted with approval:

"When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally im-

peachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances."

In Fulton *vs.* Moore, 25 Pa. St., 468, a legatee had accepted a bequest of $500 and of some other personal property of small value. She took what was given her by the will and subsequently sued in ejectment to recover her share of the land, which by the same will was devised to others.

Lewis, J., in delivering a concurring opinion, said:

"But there are other objections to the plaintiff's recovery. Ephraim, in his will, claims the place as his own; alleges that he has 'paid out of his own earnings and industry the shares devised to the other heirs of his father in his will,' and gives it, with the residue of his personal estate, to his mother and sister Eliza Lynn. Among the legacies directed to be paid out of the personal estate, is one to Dorcas, the female plaintiff. Her receipt of that legacy, in 1837, was an election to stand by the provisions of her brother's will. She could not take a benefit under the will, and, at the same time, repudiate its provisions. It matters not that the legacy to Dorcas was small in amount. If so, or if it was received by mistake, a chancellor would, perhaps, permit her, within a reasonable time, to refund it; but after the rights of *bona fide* purchasers for value have vested, and after fourteen years' delay and acquiescence, no such relief could be granted without doing injustice. She is therefore barred by her own election."

In Bradfords *vs.* Kents, 43 Pa. St., 474–483, in which the opinion of the supreme court of Pennsylvania was delivered by Judge Strong, afterwards a member of this court, the facts were that a widow had occupied real estate under the will of her husband which devised the land to her during her widowhood. She had also selected certain articles of personal property under the will and disposed of them. She finally

remarried and seventeen years after her husband's death brought suit to recover her dower in other lands. It was held that she was estopped.:

"But a widow who after having become acquainted with all that is necessary for her to know in order to make a binding election receives the gift conferred by her husband's will and uses it as her own, is not at liberty to say she did not intelligently relinquish dower. * * * I know of no case in which it has been held that a lapse of time of more than five years after acts done which are usually treated as indicating an election will not be binding upon a widow and prevent her denial of the election, though the acts were done in ignorance of her rights. Here are seventeen years without ignorance. It would be inequitable for her now to disturb these devisees in remainder or those claiming under them."

Where a will gave a life estate only to the widow and she took possession and also received certain personal property which was bequeathed to her and held possession for *one year*, when she died, it was held that although she had not made a formal election under the statutes of Ohio her representatives were barred from claiming absolutely the widow's share of the personal property (Baxter *vs.* Bowyer, 19 Ohio St., 490).

A widow was held bound by occupation for *ten years* of land devised to her for life and by her declarations that she was to have it for life (Wilson *vs.* Wilson, 145 Ind., 662).

Possession under a will for *thirteen years* was held to estop a daughter from setting up a claim adverse to the will (Drake *vs.* Wild, 70 Vt., 52).

Where a will gave a wife of the testator the income of all his real estate for ten years, and some personal property, it was held that possession by her for *nine years* before making any claim to dower estopped her to deny an election to take under the will (Hovey *vs.* Hovey, 61 N. H., 599).

Where a widow took possession under her husband's will and held it for *thirteen months* and then died, and her repre-

sentatives claimed that she died before she had been called upon to elect between the provisions of the will and her rights under the law; but it was held that her possession for that length of time of itself precluded her, and therefore would preclude her representatives, from setting up a claim adverse to the will (*In re* Well's Estate, 63 Vt., 116, 119).

These cases show that even where the other party is not shown to have changed his position injury to him is presumed. When, as here, the impossibility of putting the other parties *in statu quo* affirmatively appears, the estoppel is complete without regard to lapse of time. The statute of limitations has nothing to do with the case.

3. *This case is governed by the law relating to equitable estoppel, not by the practice or procedure of courts of equity relating to "election;" and ignorance of the law of equitable estoppel is no excuse.*

We will not weary the court with citations from the numerous authorities holding that one who takes a benefit under a will is precluded from assailing the instrument as invalid. That general doctrine was not disputed below, and probably will not be questioned here. Leading cases on the subject are Herbert *vs.* Wren, 7 Cranch, 370; Fisher *vs.* Boyce, 81 Md., 46, 52; Hyde *vs.* Baldwin, 17 Pick., 308; Smith *vs.* Smith, 14 Gray, 532; Fry *vs.* Morrison, 159 Ill., 244; Drake *vs.* Wild, 70 Vt., 52; Williams *vs.* Whittell, 69 App. Div. (N. Y.), 340, 348; Branson *vs.* Watkins, 96 Ga., 54; Van Duyne *vs.* Van Duyne, 14 N. J. Eq., 49.

In Madison *vs.* Larmon, 170 Ill., 65–82—a case which is referred to by opposing counsel as one of the few cases in the books in which the question involved here arises as in the case at bar, not between heir and the executor, but between heirs—the court says:

"This bill is brought by complainants, as heirs-at-law, attacking the will as invalid and praying that it be so de-

clared. The complainants are Kate Stark and her husband, and Katie Kirby (*née* Madison) and her husband, and Arvilla Madison. The bill cannot be maintained by Katie Kirby and her husband and Arvilla Madison, because they are beneficiaries named in the will and have taken their share of the rents. They cannot take under the will as devisees and then contest it as heirs-at-law."

In such cases the amount received under the will compared with what the party estopped would have received otherwise is unimportant (Cunningham's Estate, 137 Pa. St., 621; Lee *vs.* Tower, 124 N. Y., 370).

Nor shall we spend much space or time on the law relating to equitable estoppel in general. That principle is too well established at this day to require extended discussion. It is just as applicable in a court of law as in a court of equity (Dickerson *vs.* Colgrove, 100 U. S., 578; Kirk *vs.* Hamilton, 102 U. S., 68). It is applied even to a case where a party sets up the unconstitutionality of an act of the legislature under which he has derived a benefit (Ferguson *vs.* Landram, 5 Bush., 230; Van Hook *vs.* Whitlock, 26 Wend., 42; Daniels *vs.* Tearney, 102 U. S., 415, 421). It prevents a debtor from assailing a void judgment obtained against him when in another proceeding he has had his creditor excluded because of the judgment (Davis *vs.* Wakelee, 156 U. S., 680, 691). Even the rules of evidence will be suspended as against one who in another controversy has escaped liability by misstating them (Mexican National Railroad Company *vs.* Davidson, 157 U. S., 201; Michels *vs.* Olmstead, 157 U. S., 198).

Mr. Justice Barnard in the opinion which he filed in the case called attention to the fact that counsel in discussing the question of their right to go into the facts as to the execution of the will assumed that it was obtained by fraud. The same remark is applicable to their brief here. They cite here, however, in support of this startling method of reasoning, Neblett *vs.* Macfarland, 92 U. S., 101. It will be

seen that in that case the appellant made no question that he had got the appellee's land by fraud, in consideration of the surrender of a worthless bond. His whole contention was that the appellee should put him in a better position than he was before by paying him the money represented by the bond instead of returning the bond itself. The court was therefore dealing with a case in which fraud was admitted. Here it is denied. The court in this case cannot assume that this will was obtained by fraud. The question here is whether inquiry as to that fact can be made at all.

An intention to deceive any particular person is not necessary. It is not even essential that there should be any intention to deceive anybody.

In his work on Equity Jurisprudence, Pomeroy, in a note to section 802, vol. II, quotes and approves a passage on this subject from the case of Horn *vs.* Cole, 51 N. H., 287. In part the passage is as follows:

"The doctrine having been borrowed from equity, courts of law that have adopted it should obviously look to the practice in equity for their guide in the application of it, and in equity the doctrine had been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, *the doctrine has not in equity been limited to cases where there was an actual intention to deceive.* The cases are numerous where the party, who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet if the circumstances were such *that he ought to have informed himself,* it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals.* If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to

them and acted on them. * * * Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this State to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition."

That an intention to deceive is unnecessary is expressly held also in Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 112, 122, and in O'Donnell *vs.* Clinton, 145 Mass., 462. It is laid down as the law in 11 Am. & Eng. Enc., 2d ed., 431. In a note to the paragraph to be found there on this subject cases are cited in Alabama, Connecticut, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New Hampshire, Maine, New Jersey, New York, Pennsylvania, and Texas.

Counsel for the appellant rely upon cases relating to the practice and procedure in courts of equity relating to the doctrine of *election* as applied by those courts in will cases; but, as was clearly pointed out by Mr. Justice Barnard in this case, this doctrine has no application here at all (168).

" Election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same instrument. More comprehensively, election is defined as the choosing between two rights by a person who derives one of them under an instrument and in which a clear intention appears that he should not enjoy both " (11 Am. & Eng. Ency. (2 ed.), 59).

The Court of Appeals on this point reached the same conclusion, holding that this case is " not one of election, but of estoppel " (190).

The definition of equitable election given by Pomeroy in his Equity Jurisprudence is substantially the same as that given in the encyclopedia (1 Pom. Eq. Jur., sec. 395).

In Rawle's Revision of Bouvier's Law Dictionary, under the title Election of Rights or Remedies, it is said under the head of "In equity" that equitable election is "a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same paper."

The same distinction was clearly made in a recent case in Tennessee (Parker *vs.* Ramsey, 76 S. W. Rep., 812, decided in 1904).

This distinction between *mere* election and equitable estoppel is often lost sight of for the reason that in many cases the one becomes merged in the other. When a widow who has the right to choose between her dower and her husband's devise, or a land-owner who must let his land go to others if he accepts a benefit under a will so disposing of it, elects to take under the will, the rights of others are not necessarily immediately affected. If the widow or the land-owner, having taken a legacy from the executor in ignorance of the right to elect or in ignorance of facts which would lead to a different course, and, upon becoming informed of the law or of facts previously unknown, seeks to avoid the effect of taking the legacy, a court of equity might look upon the application with an indulgent eye. But if relying upon the implied assertion of the validity of the will by the receipt of the legacy, the executor or some other party in interest has changed his position so that he cannot be put *in statu quo*, then the doctrine of equitable estoppel may be invoked for his protection. This is stated very clearly in a case much relied upon by adverse counsel—Watson *vs.* Watson, 128 Mass., 152. It is there said that "an

election made in ignorance of material facts is, of course, not binding *when no other person's rights have been affected thereby.*"

The only other case which adverse counsel cite as holding that knowledge of the law as to election is essential to a valid election is Spread *vs.* Morgan, 11 H. L., 587. In that case the question was whether the complainant was estopped to claim under a certain will when he had claimed under a family settlement which could not stand with the will. Each of the judges who delivered opinions in the case expressly stated that the complainant had been in possession of the land which he took under the settlement, and also had been in possession of the land which he took under the will, and that he had claimed to be the owner of both. Manifestly, in that case there was, therefore, neither estoppel nor election. One who holds and claims to own both of two things cannot be said to have made a choice between them.

These two cases in 128 Mass. and 11 H. of L. are very fully considered in the opinion of the Court of Appeals in this case (187).

In the case at bar, in the strict sense there is no question of "election." The caveator was simply called upon to decide when his grandfather died whether he would assail his grandfather's will. The only "election" he was then called upon to make when his grandmother died was whether he would attempt to enforce the alleged contract with her in regard to equalizing him with his aunts in the distribution of his grandfather's estate if he would remain quiet. The situation is governed by the same rules which apply to any case when a party has a right to take proceedings in court to enforce supposed rights and fails to do so.

A closer analogy than the equitable rule as to "election" is found in the case of a vendor who, on discovering that he has been defrauded, may disaffirm the sale and bring replevin or ejectment to get back his property, or may affirm the sale by seeking to recover its value. In such a case a decision once made and acted on is binding, whether the

other party has changed his position or not. (On this general subject see Robb *vs.* Vos, 155 U. S., 13, 43; Thompson *vs.* Howard, 31 Mich., 309, 312.)

The Court of Appeals of this District has held that one who had made an ineffectual attempt to collect the value of a piano by application to the probate court could not thereafter bring replevin to recover the piano itself (Smith *vs.* Gilmore, 7 App. Cas. D. C., 192).

A vendor in this class of cases elects whether he will enforce a contract or rescind it. This was precisely what this caveator would have been called upon to do in March, 1893, if the contract alleged to have been made with his grandmother in April, 1889, had been obtained by fraud or misrepresentation, as alleged by him in his pleadings in this case. As has been seen, there was no evidence of fraud or misrepresentation. The grandmother, on the caveator's own showing, simply made a promise which she did not keep. If he had elected to sue her estate for the alleged breach of contract he would have had to sue within three years from her death or be barred by the statute of limitations; but if relying on the alleged fraud or misrepresentation he had elected to rescind, he would have been required to act at once. There was no case for the application of the doctrine held by one or two courts that knowledge of the legal effect of an election is necessary to make the election binding.

But, assuming that the caveator's alleged ignorance of law is properly raised in the case, we proceed to inquire what is the rule in this jurisdiction as to relief from mistakes of law. Before considering the authorities it will be well to see precisely what the record discloses on this point.

In his response in his pleadings to the claim of estoppel the caveator in ten separate places refers to his "ignorance of his rights," or to his alleged discovery of his "rights" in 1900 (22 to 29). Nowhere has he undertaken to define what are the rights to which he refers.

In his testimony by necessary implication he admitted that he knew he was entitled to share in the estates of his grandfather and grandmother. He expressly said that he did not attack his grandfather's will when it was first offered for probate because he relied on the alleged promise made through Mrs. Taylor the day after the funeral (66).

So, he says, he told Mrs. Taylor just after his grandmother's death that he had held still once before and now he had got to stand still (101).

Handy, the agent and attorney-in-fact of the caveator, was on the stand as a witness for the caveator, but no attempt was made to show any ignorance on his part of law or fact (115). Mr. Carusi was not examined at all, and as he acted as the attorney for the caveator in the settling up of Mrs. Utermehle's estate (84, 85, 120) his knowledge was his client's knowledge.

However, the trial judge permitted the caveator to testify as to his knowledge of law, reserving the question of the competency of the evidence (66). He thereupon said that from 1889 till 1899 he had no knowledge with respect to his "rights" in the matter, and that he did not know that the law would prevent him if he took a benefit under a will from disputing it in any way (66). At the conclusion of the evidence bearing upon the question of estoppel the court held that his alleged ignorance, if it existed, did not relieve the caveator from the effect of his acts creating an estoppel (167, 168).

The situation then is this: The caveator testified that he did not know that he could claim property under an instrument, and at the same time have the instrument held to be wholly invalid. Did this, if the jury believed him, relieve him from the equitable estoppel growing out of his acts in affirmance of the will?

The importance of this question which it is not easy to overestimate, and the earnestness with which counsel press the point, requires a careful examination of the authorities.

In Hunt *vs.* Rousmanier, 8 Wheaton, 215, parties who intended to give for a loan security upon a vessel, by mistake and under the advice of counsel, put the security in the form of a power of attorney from the owner to the creditor, authorizing the latter to make a bill of sale of the vessel. The owner having died, and this operating as a revocation of the power of attorney, the creditor being left without any security, filed a bill in equity for relief. The court by Chief Justice Marshall overruled a demurrer to the bill and sent the case back to the lower court for further proceedings. It is said in the opinion that there was no case cited holding directly that a mistake of law could or could not be relieved against. After the case had been so remanded to the circuit court the defendants withdrew their demurrer and filed an answer and the case went to hearing on the pleadings and evidence. The circuit court dismissed the bill and it was brought to this court a second time on an appeal by the complainant. This court affirmed the decree, and held that whatever exceptions there may be to the rule that no relief can be given for a mistake arising from any ignorance of law, the exceptions are few in number and will be found to have something peculiar in their character. Mr. Justice Washington, in delivering the opinion of the court, said:

"Where the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and insufficiency of such security, in consequence of a subsequent event not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

Hunt *vs.* Rousmanier, 1 Pet., 1.

A Kentucky statute gave the holder of a bill of exchange 10 per cent. damages for non-payment in certain cases. In

a case to which the statute did not apply, but to which all the parties thought it did apply, a note was given to a bank which included $1,000 damages on a prior protested bill for $10,000. It was held by this court that the parties who signed the note were liable on it and could not be relieved on account of their mistake of law. In the opinion it is said:

"The main question on which relief was sought by the bill; that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance; is, Can a court of chancery relieve against a mistake at law? In its examination, we will take it for granted, the parties who took up the bill for $10,000 included the damages of $1,000 in the $8,000 note, and did so, believing the statute of Kentucky secured the penalty to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it; no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply; indeed, the remedial power, claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remedial is well established; as was declared by this court in Hunt *v.* Rousmanier, 1 Pet., 15; and we can only repeat what was there said: 'That whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision."

Bank of United States *vs.* Daniel, 12 Peters, 32–55–56–58.

In 3d Rose's Notes on United States Reports, beginning at page 702, in a note to the above case, the following occurs:

"Cited, affirmed and principle followed in Upton *v.* Tribilcock, 91 U. S., 50, 23 L., 206, where party sought re-

lief from liability on stock, on grounds of misrepresentation by broker and mistake of law; *In re* Dunham, 8 Fed. Cas., 39, refusing relief from mistake purely of law; Allen *v.* Galloway, 30 Fed., 467, where court refused to set aside a settlement made under mistake, there being no evidence of misrepresentation or fraud; Hamblin *v.* Bishop, 41 Fed., 82, where conveyance was made under mistake; Gwynn *v.* Hamilton, 29 Ala., 239, where husband, under mistake of his marital rights, delivered personal property of his wife to her distributees; Rector *v.* Collins, 46 Ark., 178; 55 Am. Rep., 574, where parties supposed law would imply interest after maturity at same rate as fixed in note; Boggs *v.* Hargrave, 16 Cal., 565; 76 Am. Dec., 565, action at law, where purchaser at foreclosure sale made mistake as to effect of decree; Bond *v.* Coats, 16 Ind., 203, where promise to pay, made under mistake as to liability, was enforced; Oiler *v.* Gard, 23 Ind., 219, and there can be no presumption of fraud where parties entered into contract with full knowledge of facts; Pierson *v.* Armstrong, 1 Iowa, 291; 63 Am. Dec., 447, where father granted property to his married daughter with intention same should never pass to her husband; Stover *v.* Poole, 67 Me., 223, where deed and bill of sale was executed under mistake; Sandlin *v.* Ward, 94 N. C., 495, where covenant was made under mistake as to its legal effect; Arnold *v.* Donaldson, 46 Ohio St., 81; 18 N. E., 544, where lands were purchased under advice of counsel that title was clear, and dower was subsequently assigned in same; Good *v.* Herr, 7 Watts & S., 256; 42 Am. Dec., 237, where there were mutual mistakes as to who were heirs-at-law of an intestate; Desert Bank *v.* Dinwoodey, 53 Pac., 220; 17 Utah, 60, where mistake was made with full knowledge of facts; McDaniels *v.* Bank, 29 Vt., 240; 70 Am. Dec., 413, mistake made under advice of counsel; Zollman *v.* Moore, 21 Gratt., 323, where estate had been distributed in accordance with petition, but petition had been drawn under mistake as to legal rights of petitioner; Harner *v.* Price, 17 W. Va., 542, where party through ignorance of law confessed judgment when he might have plead statute of limitations; Cooley *v.* County of Calaveras, 121 Cal., 485; 53 Pac., 1076, where the understanding of law at date of settlement of a claim was held conclusive."

In Wheeler *vs.* Smith, 9 How., 55–82–83, an heir-at-law in consideration of a sum of money gave a release to the executors of his uncle's will in ignorance of the fact that a charitable devise in the will was invalid, and was relieved on that ground. One of the executors, who was a distinguished lawyer of high standing, had advised the heir that the devise was good. The court said:

"But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the complainant $25,000 for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria."

In U. S. *vs.* Hodson, 10 Wall., 395, under a statute which required distillers to give a bond conditioned for their complying with some of the provisions of the internal-revenue laws, a bond was taken which required compliance with all the provisions of law on the subject. The bond was held binding on the sureties as to everything covered by its terms. At the conclusion of the opinion the court says:

"But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hard-

ship in holding that the contract as made is the measure of the rights of the Government and of the liability of the obligors."

In Railroad Co. *vs.* Soutter, 13 Wall., 517–524, the bondholders under a second mortgage on a railroad bought in the road, subject to an earlier mortgage, and formed a new corporation to operate the railroad. Certain creditors filed a bill to set aside the sale as fraudulent as against them. While that suit was pending the bondholders under the first mortgage obtained a foreclosure. The new corporation thereupon paid off the bonds secured by the first mortgage. The creditors having finally secured a decree setting aside the sale under the second mortgage, the new corporation sought to recover back the money paid to the original company. It was held that they could not recover, because the mistake they had made was one of law and not of fact.

In Upton, assignee, *vs.* Tribilcock, 91 U. S., 45–50, one who had subscribed to stock in a corporation upon representations, which he relied upon, that he would have to pay less than the face of the stock was held liable in full on the ground that a misstatement of the law will not avoid a contract; and the court cites Hunt *vs.* Rousmanier, 8 Wheaton, 174, in support of that proposition.

In Lamborn *vs.* County Commissioners, 97 U. S., 181–185, it was held that taxes paid under an erroneous impression that they were valid could not be recovered, although the law under which they were collected was invalid, because the party paying the taxes had merely made a mistake of law. The court again cites Hunt *vs.* Rousmanier, *supra*, in support of this doctrine.

In Snell *vs.* Insurance Company, 98 U. S., 85–92, an insurance policy on cotton was issued to one of several joint owners upon the assurance of the agent of the insurance company that a policy in that form would protect the interests of all the joint owners. A bill to reform the contract in ac-

cordance with this understanding of the parties was sustained, stress being laid by the court on the fact that it was the action of the company's agent that caused the insured to believe that a policy taken out in his own name would protect his associates as well. In delivering the opinion of the court Mr. Justice Harlan refers to Hunt *vs.* Rousmanier as holding that a mistake of law may be corrected, but he says further on that the court in the case before it did not depart from the salutary rule that "a mere mistake of law stripped of all other circumstances constitutes no ground for the reformation of written contracts." He adds that in such cases the party aggrieved must act promptly, and that the evidence must be of the clearest and most satisfactory character.

In United States *vs.* Ames, 99 U. S., 35, the United States in a proceeding in admiralty had taken a bond in lieu of the vessel in controversy. One member of a firm signed the bond in his individual name as surety. The United States, being unable to satisfy its claim against the parties to the bond, filed a bill against the representatives of another member of the firm seeking to have his estate held on the ground that the bond was given under the direction of the firm and for its benefit, and that the firm got the vessel, the contention being substantially that a mistake had been made in having the individual partner sign his own name instead of that of the firm, all parties supposing the firm to be bound.

The court said:

"Concede that, and still the complainants aver that they did not know, when they obtained their decree against the claimant and his sureties, that the property belonged to the partnership, or that the bond for value was in fact given by the claimant pursuant to the direction of the other partners.

"Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an

averment of a mistake of law against which there can be no relief in a court of equity (Hunt *v.* Rousmanier's Administrators, 1 Pet., 1)."

In Laver *vs.* Dennett, 109 U. S., 90, where a license had been granted for the use of a patented invention in a certain district, the parties intending—but not expressly providing—to give the licensee an exclusive right, a bill was filed to have the license contract canceled as made under a mistake of law, and to have suits at law which had been brought to enforce the contract enjoined. The bill was dismissed, the court saying, "There was no doubt a mistake, but it was in the instrument which undertook to express the agreement, and not in the agreement itself."

In Griswold *vs.* Hazard, 141 U. S., 260–284, one Durant was arrested in Rhode Island on a writ of *ne exeat*. He gave a bond, with a surety, conditioned upon Durant's abiding by and *performing* any decree that might be rendered against him. The surety understood that this was a bond conditioned for the appearance of Durant. A decree for a large sum having been obtained against Durant, which he did not pay, the surety filed a bill to cancel or reform the bond so as to exempt him from pecuniary liability on it as surety for the payment of the amount mentioned in the decree up to the penalty of the bond. The relief prayed for was granted, on the ground that the attorneys for the creditor for whose protection the bond was given had misled the surety by leading him to believe when he signed the bond that it was a bond to secure the appearance of the debtor, and not to secure the payment of the debt.

In the United States circuit court for the western district of Tennessee, Hammond, circuit judge, held, in 1887, that whatever rule may prevail in other jurisdictions, it is clear that there can be in the equity courts of the United States no relief from a mistake of law. In that case a controversy between a member of a firm and his individual creditor had

been settled by a compromise which applied a debt due from the creditor to the firm to the satisfaction of the indebtedness of the individual member of the firm. The creditors of the firm afterwards collected the debt from the creditor for their benefit. The court adds as an additional ground for refusing relief was that the parties could not be put *in statu quo* (Allen *vs.* Galloway, 30 Fed. R., 466).

A deed was made which provided that it should be absolute if the grantor failed to pay a certain indebtedness by a fixed date. It was decided that this was a mere mortgage, and it was held that the plaintiff's mistake of law in supposing that he would get a complete title when the time fixed expired if the debt was not paid could not be relieved against, although relying upon his supposed absolute title he had entered into a compromise of other matters with other parties in which the land figured. The court said:

"Every man is charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind" (Rankin *vs.* Mortimere, 7 Watts, 372).

A widow who had received certain furniture, live stock, &c., under her husband's will, gave a receipt for the property, to which she added the words: "I hereby accept under the will." Less than five months afterward she notified the executors that she would claim her share of the estate under the intestate laws. The supreme court of Pennsylvania, speaking through Chief Justice Black, said:

"Every one is conclusively presumed to know the law. Without this presumption no law could be executed. Those who desire to violate it could easily misunderstand it, and ignorance could be feigned where it does not exist. If contracts were binding only on those who know what construction the courts would put upon them, very few would stand. No system of jurisprudence could be administered for a year on this principle without falling to pieces. All codes therefore have adopted the maxim, '*Ignorantia legis neminem*

excusat.' I speak of a mere mistake, and not of misapprehension induced by the fraudulent acts of others. Where the party who commits an error of this kind is led into it by his adversary, who afterwards seeks to have the advantage of it, equity may give relief. So also the rule must be understood as referring to a naked mistake of pure law. In some of the books 'knowledge of one's legal rights' is a phrase used to express that degree of information upon both fact and law which enables a party to judge how far a demand can he enforced by him or against him. The relief which equity gives for such ignorance of legal rights is based on the mistake of fact. Again, the contract cannot be enforced by one who has wilfully, knowingly and fraudulently abused the ignorance of the other party. If a widow who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, is induced by one who knows the law and at the same time knows her ignorance of it, to release or assign it for a totally inadequate consideration, she ought to be relieved. But where the error is her own and no imposition has been practiced, nor any fraudulent advantage taken, her acts, done under the influence of it are as binding upon her as if she knew the law perfectly. It is not pretended in this case that the demandant's mistake of the law (if she made one) was caused by the defendant, or by the executors of her husband, or by any person interested in the estate, nor is it asserted that they had any more knowledge of the subject than she had. That she was not ignorant of any material fact is conclusively established by the verdict."

Light *vs.* Light, 21 Pa. St., 407–412.

And even in a subsequent case in Pennsylvania in which the question was whether a widow was estopped from claiming land belonging to her which her husband had disposed of by his will, by having received her husband's personalty under his will, and having filed her account as executrix accordingly, in which case the doctrine was laid down that the burden was on the defendants to show that the widow had made an election and *that it was made with knowledge of all the facts,* the court further says:

"What fact then was there to be submitted to the jury? Certainly not the fact whether she received and retained the personal property according to the will. This was conclusively shown by her account. Nor whether she knew the situation, circumstances and value of her husband's estate, or the disposition which he made of it by his will. It was her duty to inform herself and she must therefore be presumed to have known" (Cox *vs.* Rogers, 77 Pa. St., 160).

A married woman by her will undertook to devise land to her husband. The will was void because under the laws of New York at that time a married woman could not dispose of her property by will. Her father was her heir. He, however, encouraged the devisee in selling the land to another person. Afterwards he brought ejectment proceedings against the purchaser. The latter filed a bill to enjoin the action at law on the ground of equitable estoppel. The father claimed, and the court found, that when he encouraged the sale he understood and believed that his daughter's will was valid, and that her husband had a good title under the will. Yet it was held that he was estopped. In delivering the opinion in the case Chancellor Kent said:

"The presumption is, that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse, than to permit a person to reclaim his property, in opposition to all the equitable circumstances which have been stated, upon the mere pretence that he was at the time ignorant of his title. Such an assertion is easily made, and difficult to contradict. It is rarely, that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practiced upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate, that he, and not the purchaser, ought to suffer. His ignorance of the law ought not to protect him from the operation of the rule of equity.

He could easily have dispelled that ignorance, for he had the fact of the will of his daughter before his eyes; and if he may be allowed to plead his voluntary ignorance, in destruction of equitable rights, growing out of his own acts and assertions, the grossest imposition, and the greatest fraud, might be practiced with impunity. It would seem, therefore, to be a wise principle of policy, that ignorance of the law, with knowledge of the fact, cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions, that ignorance of one's legal right, does not take the case out of the rule, when the circumstances would, otherwise, create an equitable bar to the legal title."

Storrs *vs.* Barker, 6 Johnson Chancery Rep., 166.

In Whitwell *vs.* Winslow, 134 Mass., 343–345–346, the plaintiff had received from the defendant a promissory note which was not negotiable because of the omission of the words "or order." The defendant had told the plaintiff when he delivered the note to him that it was not necessary to make it payable to the plaintiff's order—that the plaintiff could sue upon it as it stood. Yet it was held that the plaintiff could not recover because even if he had been induced to take the note by what the defendant said to him as to its negotiability "it was a statement of an opinion upon a question of law where the facts were equally well known to both parties."

A good review of the authorities on this question of relief from mistakes of law will be found in 55 Am. St. Rep., 494–520. See especially the paragraph headed "Exceptions to the general rule."

In all the above cases except three relief from the results of a mistake of law was denied. The exceptional cases are Wheeler *vs.* Smith, 9 How., 55, 82; Snell *vs.* Insurance Company, 98 U. S., 85, 92, and Griswold *vs.* Hazard, 141 U. S., 260. *In each of these cases the decision is on the express*

ground that the injured party had been led into his error by the other party or by his agent or attorneys.

In the case at bar it is not even charged—and certainly there is nothing in the evidence tending to prove—that either Mrs. Taylor or Mrs. Norment or anybody else advised the caveator that by taking under the will of his grandfather he would not preclude himself from thereafter assailing the will. It is not pretended that the caveatees or anybody else told the caveator that if he agreed with his grandmother not to contest the will of his grandfather in consideration of her giving him $600,000 or some other sum out of the personal estate, and received from her over $100,000 under that agreement, that he could keep the $100,000 and ignore the contract. It is a bald case—an alleged mistake of law—sustained only by the statement of the party alleging ignorance. If such a plea so sustained is sufficient to enable the party to go to a jury, it must be good in every case of equitable estoppel. The heir who wrote the letter in Dickerson *vs.* Colgrove, 100 U. S., *supra*, could have avoided the effect of it by swearing that he did not know that one who tells another he claims no interest in certain land, thereby inducing that other to change his position in regard to the land, would be precluded from afterwards claiming the land; and so in all the other cases on estopped cited in this brief or to be found anywhere.

IV.

THE ALLEGED TENDER.

1. *The Evidence.*

In his reply to the estoppel set up by the caveatees the caveator averred that when he learned in 1900 what his "rights" were he wrote a letter to the caveatees in which he tendered himself *ready to account* to them for their two-thirds share in the Young law building (24), and that "as

soon after the death of Sarah Utermehle as he became aware of his real rights under said agreement with said widow and the petitioners he served notice upon the latter that as a matter of fact what portion he took of the estate of Sarah Utermehle was taken by him as one of the heirs-at-law of both George W. Utermehle and Sarah Utermehle, *for which he is willing to be charged* as part of his distributive share" (28).

The letters referred to were put in evidence during the direct examination of the caveator (30, 69, 93). He admitted, on cross-examination, that for what he had received under the will of his grandfather, both directly and through his grandmother, he had never made any offer to refund or account in any way except the offer contained in those letters. In the letters, after notifying the caveatees that he denied the validity of the will of his grandfather, he stated that he contended that it had never been operative as to real estate, and that in that event the real interest vested in him in the Young law building was merely a one-third interest, and he added that he tendered himself "*ready to account upon demand*" to both Mrs. Norment and Mrs. Taylor for their one-third interest as heirs-at-law of their father in that building and in the rents and profits of it from the time of their father's death. He further stated in the letters that he tendered himself "*ready upon demand to make proper settlement*" to Mrs. Norment and Mrs. Taylor for the $750 note and accrued interest. He gave no notice that he intended to dispute the will as a will of personal property. He made no offer to return or even to account for the personal property, amounting to over $100,000, which he had received from his grandmother, whose authority to dispose of it was derived from her husband's will; and he made no offer to return or even to account for the $13,500 which had gone to his creditors in the sale of his one-third interest in square 765, which interest he acquired also through his grandmother under

authority of the will he now seeks to dispute; and, what is even more important, he did not even refer to the $9,000 which his grandmother had paid to certain legatees under the will or to the several hundred thousand dollars of personal property which passed to Mrs. Utermehle under the will and which she had disposed of in charities or in some other manner.

The caveator stated that up to the time he gave his testimony he had received no answer to either of these letters and had received no communication of any kind from Mrs. Taylor or Mrs. Norment (70). In his answer, filed November 3, 1900, he averred that he waited for two months after writing the letters before taking any legal action in the case, and that during that time no response to the letters was received from the caveatees (29). Mr. Lambert, one of his counsel, testified that two or three days after the letters were sent he was informed by one of the counsel for the caveatees "that there was going to be a contest; that the matter was going into litigation;" that "contest" or "fight" was used in this conversation between counsel, probably both words, and that he, Lambert, was informed that the letters had been received. Mr. Lambert further testified that, having received these declarations and having received no other answer to the letters of tender, he told his client, the caveator, that there was going to be a fight, and that there was no necessity for a further tender (114).

The only evidence as to the ability of the caveator at the time the letters were written or at any subsequent time to make good the so-called tender was as follows:

The caveator himself was asked by his counsel whether he at that time was in a position to carry out the tender made in the letter, if it had been accepted, and he replied that he was (70). On his cross-examination he stated that when he wrote the letters he did not mean that he was simply to be charged in an accounting with the rents and profits of the Young law building, but that he did mean that he was ready

to produce the property; that he was prepared at that time to carry out the letter; that the rents which he had collected from the Young law building before he sold it amounted to about $1,800; that he could have gotten the money to pay back this $1,800, having made arrangements with Mr. Lambert to get that money as soon as he wanted it; that he did not know of his own knowledge who was to advance the money; that it was not merely his intention that he should be charged in his account with the amount which he got if he succeeded in breaking the will; that in the letters he agreed to deliver back the Young law building and the supposed legacy of the $750 note; that the arrangement as to obtaining money to carry out the offer made in the letters and the arrangement for obtaining the money to get the property back was through Mr. Handy, and that witness knew nothing about it, except what Handy said and as to the arrangement through Mr. Lambert he had no knowledge except what Mr. Lambert had told him (106–107). Mr. Lambert testified that when the letters were written he had made arrangements and had under his control upwards of $30,000 in cash; that he had sufficient money to substantiate the tender and make it good and would do it; that he had the money at the time the letters were written and for several months thereafter (114). On his cross-examination, when asked in regard to the $30,000 in cash, he said that he thought he had about $20,000 of it in bank at the time; if not he could have gotten it in a few moments; that his idea was, although he did not look it up, that his deposits at that time in four different banks, which he named, amounted to $25,000; that he had other sources upon which he could draw, and could have obtained $20,000 more from his mother if he had wanted it; that he could not say he had made any arrangements when the letters were written about the $25,000, but knew if he went to the bank and asked for it he could get it (114–115).

At this point counsel for the caveator stated to the court

that no tender had been made in relation to what the caveator had received under the grandmother's will, but there was an offer in the pleadings to account for that part of it (115). It is not a matter of much importance, perhaps, but the language referred to is not susceptible of such an interpretation. It refers (28) to such an offer as having been made in the letters; but the letters contain no reference to the money or interest in land received by the caveator through his grandmother.

Mr. Handy, the real-estate broker, testified that in May, 1900, at the request of the caveator, he telephoned another real-estate broker, Mr. Easterday, who, he understood, had the Young law building for sale; that Easterday told him that he, Easterday, had to get it from Early and Lampton, a firm of real-estate brokers who controlled it; that he called up Easterday a second time and the latter told him he could not do anything because there were negotiations for an exchange; that in a day or two Easterday telephoned him he would give him an option; that witness thinks, according to his best recollection, that this option was for $25,000, and was, he thinks, for three or four days; that this was all verbal, and that he did not report the fact that he had the option to Mr. Utermehle (115–116).

2. *Tender—The Law.*

The authorities are practically unanimous in support of the proposition that before one who has received a legacy or taken any other benefit under a will can be heard to assail the will he must return or tender back to the executor that which he has received, as a condition precedent to the institution of any proceedings assailing the will. We have seen that it is not contended in this case that anything received by the caveator has been returned to anybody, and that it is also conceded that no tender or offer of any kind was made to the executrix under the will of George W. Utermehle, or

since her death, to anybody standing in place of the executrix and representing his estate.

Nor is it claimed that as to the sum of over $100,000 received at various times by the caveator from the executrix (over and above what was given to him by the will of her husband) or from her estate under her will bequeathing what she had received from her husband by virtue of the will here in controversy, any tender or offer of any kind was made to any person prior to the filing of either of the caveats in this case, or even in the caveats themselves.

In this regard, as we have seen, his claim—unfounded, as has been shown above—is that in his answer to the estoppel set up against him he expressed a willingness to account for what he had received from his grandmother or her estate.

Unless, therefore, the letters of May 19, 1900, to Mrs. Taylor and Mrs. Norment constitute a sufficient tender, no such tender has been made.

"It is still a condition precedent to the right of rescinding a contract that the party against whom relief is sought *shall be restored substantially to the position he occupied before the transaction complained of;* the right to rescind can be exercised only upon the terms of restoring the consideration received or, so far as is at all permitted, its value. This is strikingly illustrated in the case of attempted defenses to actions upon contracts of sale obtained from the purchaser by fraud. The injured party cannot allege the fraud in bar of the action without *tendering back the property received;* though he may show the fraud in recoupment of the amount the plaintiff would otherwise be entitled to recover."

* * * * * * *

"The rule requiring tender is not dispensed with by evidence that the injured party disposed, in whole or in part, of what he had received before having become aware of the misrepresentations. He will then be left to an action for damages, or to a right to have the contract price reduced if the price remains unpaid; and the former he cannot have if the misrepresentation was innocent" (1 Bigelow on Fraud, 420, 423).

A mere allegation in a pleading that one tenders, is no tender (1 Beach on Modern Law of Contracts, sec. 299). It is not every offer to deliver that amounts to a tender. The offer must be made under circumstances which give to the other party the opportunity of examining and receiving the thing tendered (*id.*, 301). Tenders are always to be considered *stricti juris*. If a tender is not legal in every respect even a court of equity will not support it nor supply a defect. Nor are tenders more favored at law; the rules which govern them are strict and must be strictly applied. Therefore a tender must always be kept good. * * * The failure to keep the tender good by using the money after tender destroys the attribute of a legal tender. * * * The burden of proof is on the one pleading tender to show that he set the money aside and has not had the use of it. If he has had the use of the money, this destroys the effect of a tender (*id.*, sec. 302).

In Talty *vs.* Freedman's Savings and Trust Co., 93 U. S., 321, Talty had placed in the hands of one Kendig his own note for $3,000 and had given to Kendig as collateral security a certificate representing a claim against the District of Columbia. Kendig sold the certificate to an innocent purchaser. Just before the maturity of the note Talty called on Kendig "and offered to pay the note and demanded back the collateral." Kendig declined to accept the proposition and insisted that the agreement between him and Talty was that he, Kendig, was to have the right if he chose to take the certificate at ninety cents on the dollar, and he offered to settle with Talty on that basis. The court held that Talty's offer to pay was not equivalent to an actual tender.

In a case in this jurisdiction, in which a bill was filed for the specific performance of a contract for the sale of land, the vendor had been tendered the exact amount due in the form of a certified check for the whole amount of the purchase-money. It was held that this tender was insufficient. Chief Justice Alvey, speaking for the court, said:

"Before the plaintiff could rightfully demand performance on the part of the defendant he should have tendered strict performance on his own part."

Barbour *vs.* Hickey, 2 App. Cas. D. C., 207.

"Applying the principle that knowledge is essential to constitute a valid election, it is established that where the act is induced by deception or fraud, or where the person electing acted under an ignorance of the facts or under a misapprehension of his rights, and innocent third parties will not suffer by a revocation, the act may be revoked or set aside. But such an election can be revoked only *by restoring the property* received under it" (11 Am. & Eng. Ency. (2d ed.), 98, 99).

Every legatee who puts in suit the validity of a will *must bring into and leave in the registry of the court* the amount of his legacy, if paid, to abide the event of the suit (Braham *vs.* Burchell, 3 Addams' Ec. R., 243).

"A party who has received a legacy under a will cannot be permitted to contest the will without *repaying the amount of the legacy or bringing the money into court.* * * * But if the party so having received a legacy afterwards desires to contest the will, there is a great reason that he should *tender to the executor or bring into court the amount received.* The security of the executor may require this and if the party can withhold it he may at one and the same time treat the will as valid and invalid. * * * In ordinary cases, therefore, when a party seeks to repudiate a will as insufficient, he must do so wholly and entirely by refusing until it has been established to receive the benefit of it, or if anything has been received, *by returning it to the executor, or placing it in the custody of the court* that the executor may have it in case the judgment should be against the validity of the will" (Hamblett *vs.* Hamblett, 6 N. H., 333, 337, 338).

In Chipman *vs.* Montgomery, 63 N. Y., 223–234, in an action for the construction of a will it appears that two of the parties to whom the will gave legacies had received and receipted for their legacies in whole or in part. It was held

that because they had accepted the benefits of the provision made for them in the instrument they could not be heard in opposition to other parts of it, except upon proof that they had not intelligently elected to take under the will and *the return of all they had received.*

In the same State, in the subsequent case of *In re* Peaslee, 73 Hun., 113–115, a daughter of the testator had received from the executors several payments which were made to her on account of a bequest given her by the will. Afterwards, and within the time allowed by law, she filed a petition in the surrogate's court assailing the will. The executors answered that they had made to the petitioner the payments above referred to, and that she had not offered to return or refund the same, and demanded accordingly a dismissal of the proceeding. The court quotes with approval the above-mentioned case of Chipman *vs.* Montgomery on the point as determining that the petitioner must show that she had not intelligently elected to take under the will and that she had returned all that she had received under it. It then goes at length into the authorities in support of the general proposition that he who takes a benefit under one provision of a will must allow all the other provisions of the instrument to be carried into effect, and adds:

"Here he says no injury can result to the executors or any one else, because the petitioner is permitted to contest the will while retaining the $7,000 which she received from the executors, because if the will be set aside she, as one of the next of kin, will be entitled to receive a larger sum of money than $7,000 and, therefore, the executors can be amply protected by the surrogate. It may be true that if the contest should proceed it would so turn out, but of that we are not assured.

"It does not appear that should the petitioner be successful in her contest, that as a result her mother's intestacy will be established.

"*There may be other and prior wills in existence,* the validity of one of which may be established, with the possible result that the petitioner will not receive thereunder a legacy suf-

ficient in amount to make good the advancement to her by these executors. Certainly the contrary cannot be safely assumed.

"The fact that the petitioner received this money, and expended it before becoming aware of the facts which encouraged her to enter upon a contest of the will, may perhaps be unfortunate for her. If misfortune it be, it arises of course from the necessities which induced her to expend the money. Where a person asks that a rule be not applied, on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the facts which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the results may be, no one can be the loser, because of the payments originally made to her, she is not in a situation to attack the will."

Where a testator left an estate of nearly half a million dollars and by his will gave to one of several children nearly all of his estate, it was held that one of the "practically disinherited" children was not estopped to dispute the will by having accepted several small sums under it. The court intimates that it is doubtful whether "the receipt of money by a legatee claiming to be entitled to receive it and much more as an heir-at-law can be treated as an election to affirm the will," but decides the case on the ground that such a legatee may contest the will if he *returns the amount of the legacy to the executors or brings it into court* (Miller's Estate, 159 Pa. St., 562, 574; same case, 166 Pa. St., 97).

In Brown *vs.* Appleman, 83 Mo. App., 29, all the parties in interest had assented to a settlement of an estate as in case of intestacy, because one of the attesting witnesses had refused to testify that the testator at the time he executed the will was of sound mind. Afterwards some of the parties sought to have the will admitted to probate. They admitted that an administrator had been appointed and had distributed the estate as in case of intestacy, but contended that the proceedings in that case were against their consent and contrary to their known wishes, and they stated that

"*they tender and offer to pay into court all moneys received by them in the distribution.*"

It was held, however, that the petitioners could not maintain the proceeding, the court saying:

"The appellants seek to avoid an estoppel by conduct by stating that they accepted their share as distributees of the estate from the administrator, and took the parts distributed to them in the partition proceedings, but gave notice that they objected to the administration and objected to a partition and now offer to undo what they have done. They put themselves by their reply in the position of protesting, yet consenting; of denying, yet affirming and ratifying what they had done; of claiming that there was a will, yet repudiating it by accepting distribution of the estate contrary to and against the provisions of the will—of 'blowing hot and cold.' The plaintiffs by their conduct are estopped to assail the existence of the will by which they claim a greater estate than they have already received."

In Balue *vs.* Taylor, 136 Ind., 368, it is said to be elementary—

"That where a party to a contract seeks to avoid it for fraud, or asks to rescind it on the ground of fraud, he must tender back to the other party whatever of value he received for the property which he seeks to recover by the rescission,' and "that if a party, upon the discovery of fraud in the procuring of a contract, fails to return, or offer to return, whatever of property or thing of value he has received under the contract, he thereby affirms the contract, and cannot afterwards be heard to complain."

Some cases have been cited in the opposing brief in support of the proposition that in such a case as this no tender is required, or that an offer to account made in the pleadings is a sufficient tender. The principal case relied upon in this connection is Madill *vs.* Snyder, 61 Kansas, 15. In that case the court quotes from the above-mentioned cases of *In re* Peaslee, 73 Hun., 113; Hamblett *vs.* Hamblett, 6 N. H. 333; Holt *vs.* Rice, 54 N. H., 402, and Miller's estate, 159

Pa., 562, as all requiring repayment as a condition precedent to the assault upon a will. The court then says, however, that an offer to restore made in the pleadings is "sufficient in a case of this character." The only case cited by the court in support of this proposition is Thayer *vs.* Note, 59 Kansas, 181, in which case it was held that it is sufficient in a bill to rescind a contract to offer to return what has been received. And Shuee *vs.* Shuee, 100 Ind., 477, and 1 Daniel's Ch. Pl. & Pr., 6th ed., 385, are cited. Upon reference to the case referred to in 100 Indiana, it will be seen that it holds that the law seems to be as stated, because in equity the court can protect the defendant by requiring restoration or an accounting for property received by the complainant as a condition precedent to rescinding the contract. The same statement is made in the paragraph in the work of Daniel referred to. And in note *a* to the page in question occurs the following passage:

"In Thomas *v.* Beals, 154 Mass., 51, which was a bill to set aside a collusive sale, Holmes, J., said: 'A bill in equity is not like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse which was obtained by a fraudulent exchange and to which the plaintiff has no right unless he has restored what he has received (Thayer *v.* Turner, 8 Met., 550). The foundation of this bill is that the rescission is not complete, and it asks the aid of the court to make it so. It is objected that at least the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the court has power to impose equitable conditions upon the relief granted the plaintiffs. And it is hardly, if at all, conceivable that this decree in any event could be for the relief of the defendant alone against the plaintiffs, as in the case of an account, where, nevertheless, an offer is no longer necessary (Goldthwait *v.* Day, 149 Mass., 185). The plaintiffs, by seeking to set aside the conveyance, have elected to adopt all the consequences of rescission.'"

It will be seen that the authorities cited by the court in the case in 61 Kansas do not in the least degree support the conclusion which the court reaches. In equity a mere offer to account may be sufficient, or even that may be dispensed with, because when the chancellor enters a decree rescinding a contract he has the power to so mold the decree as to require a proper return or accounting from the complainant; but a court of common law or a probate court has no such power, and as the reason for the exception fails the rule itself must fall. In this case, for instance, the will must be admitted to probate as a will of real estate unconditionally or it must be denied probate.

In this connection counsel also refer to the case of Wheeler *vs.* Smith, 9 How., 55. That was a case of a bill in equity filed to rescind a contract, and what has just been said in regard to the Kansas case applies to it. But in addition to this the court, in its opinion in that case, does not refer at all to the matter of tender. Objection on the ground that no tender had been made was suggested by counsel for the defendant in his brief (71); but although a full abstract appears to be given of the brief filed in reply, this point is not mentioned, nor is it referred to by the court. For some reason, therefore, which does not appear in the report of the case this point must have become immaterial.

Opposing counsel refer, also, as showing that no tender is required, to the case of Montgomery *vs.* Pickering, 116 Mass., 277. In that case the owner of a parcel of land in Boston sold it for $7,000, in ignorance of the fact that the city had just condemned it for about $9,000. The vendee knew of the condemnation proceedings and concealed the fact from the vendor. The vendee filed a bill in equity to rescind the sale, and it was held that it was not necessary to maintaining the suit that he should return the $7,000, the court saying:

"Nor was there any necessity, upon the facts disclosed, for the plaintiff to restore or offer to restore the defendants to

the position in which they were before the deed was executed. By the payment made to her upon delivery of the deed the plaintiff took nothing from the defendants that she was not entitled to, and there was nothing, therefore, on her part to be restored."

Counsel also rely in this connection upon Howard *vs.* Railroad Company, 14 App. Cas. D. C., 297. That was a case of an action for personal injuries, in which the plaintiff sought to avoid the effect of a release which had been given to the defendant shortly after the accident. In that case it was held that a tender of the money received was sufficient if made at the trial. But this is put upon the ground that the plaintiff had signed the release on the faith of a statement made to her by an agent of the defendant that it was merely a receipt *for a gratuity.*

In delivering the opinion of the court in the last-mentioned case, Mr. Justice Shepard says that even if it were a case like that of Lyons *vs.* Allen, 11 App. Cas. D. C., 543, the court would be inclined to hold that a tender made any time before the case was finally submitted to the jury was good, citing Smith *vs.* Holyoke, 112 Mass., 517.

In the Massachusetts case referred to the decision was put expressly on the ground that the plaintiff did not know until the paper was read at the trial that it was a release. She had signed it believing it to be a receipt for a gratuity.

In the case of Lyons *vs.* Allen, 11 App. Cas. D. C., 549, a judgment for the plaintiff was reversed on the sole ground that the money paid to the plaintiff by the defendant when the alleged fraudulent release was given had not been returned.

Chief Justice Alvey in delivering the opinion of the court in that case, said:

"It is a condition, however, to the exercise of the right so to avoid the effect of the release, at law as well as in equity, that the party seeking to rescind or avoid the instrument must restore the consideration received, or put the other

party in *statu quo;* and this principle applies as well in cases of rescission or avoidance on the ground of misrepresentation and fraud as to other cases (Bartleet *v.* Drake, 100 Mass., 174, and cases cited). It would seem to be but right and just, that a party after accepting a certain sum in settlement of an unliquidated claim for damages under a contract or release, and afterwards seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, that he should first refund the amount received. This principle is settled by many express decisions of courts of the highest authority, though there are cases to be found to the contrary. The great weight of authority, however, is clearly in support of the principle just stated, and we think it just and right upon principles of reason and equity (Coolidge *v.* Brigham, 1 Metc., 547; Estabrook *v.* Swett, 116 Mass., 303; Brown *v.* Hartford Ins. Co., 117 Mass., 479; Mullen *v.* Old Colony R. Co., 127 Mass., 86; Burton *v.* Stewart, 3 Wend., 236; Gould *v.* Bank, 86 N. Y., 75; Bain *v.* Wilson, 1 J. J. Marshall, 202; Tenn. R. Co. *v.* Hays, 83 Ga., 558; Home Ins. Co. *v.* Howard, 111 Ind., 544; Vandervelden *v.* Chicago, &c., R. Co., 61 Fed. Rep., 54)."

In the brief for the appellant here it is urged upon this court that its decision in Lyons *vs.* Allen is inconsistent with the following cases:

Union Pacific R. R. Co. *vs.* Harris, 158 U. S., 326: In that case the bill of exceptions did not contain all the evidence (330). Nothing is said on the subject of tender in the opinion. The only reasonable inference is that one had been properly made, so that there was nothing said about it either by counsel or by the court.

Girard *vs.* St. Louis Car Wheel Co., 123 Mo., 358: In that case four out of seven judges held that the point as to failure to return the tender could not be made in the appellate court because it was not made at the trial court, either in the pleadings or in asking instructions to the jury. The other three judges dissented. The dissenting opinion is perhaps as full and able a review of the authorities holding a return or tender necessary as can be found anywhere.

Westlake *vs.* Button, 77 Mo., 47: That was an action to recover an alleged excess over the proper rate of a certain water-license tax. All that was held in that case was that it was not necessary that the plaintiff should have tendered what he admitted to be due on account of the tax because what took place between him and the authorities showed that such an offer would have met with "prompt and peremptory refusal."

In Smith *vs.* Holyoke, 112 Mass., 517, as has been seen above, it appeared that the plaintiff did not know that the paper which she had signed was a release at all until it was produced at the trial, and the decision was put upon that ground.

Mullen *vs.* Old Colony R. R. Co., 127 Mass., 89: This was another of the cases in which a release was signed, believing it merely to be a receipt for a gratuity. The decision is put upon that express ground, the court saying that one who seeks to assail a compromise settlement must first return what was paid to him under the settlement.

O'Donnell *vs.* Clinton, 145 Mass., 461: In that case the town had taken a part of the plaintiff's land, including a part of his house. He received $200 from the town and gave a receipt in full, which he, however, was led to understand was a receipt for the value of the land only. The court held that in order to avoid the effect of the receipt it was unnecessary for the plaintiff to make a tender, but that a sufficient tender had been made.

As to the claim that a tender is unnecessary where the other party has made it evident that a tender would not be accepted, we do not dispute that that is the law; but here all that the caveatees did in reply to the letter relied on was to employ counsel, and counsel informed the attorneys for the caveator that there was to be a "fight" or "contest." There was in this nothing inconsistent with an intention to defend on the ground that no tender had been made. Moreover, the persons to whom the offer to account was made

and who employed counsel to defend their property were not the representatives of the estate of George W. Utermehle, and therefore they could not waive a tender if they had been disposed to do so.

Long after this case was decided in the Court of Appeals the supreme court of Missouri was called upon—in February, 1894—to determine a case involving similar questions. The opinion in that case is so pertinent here that we quote the following extract from it:

"The sum of the matter, then, is that, as a general rule, one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity, but the general rule is subject to this qualification: That if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election, and contest the validity of the instrument, and claim under the law, provided that innocent third persons will not suffer by a revocation and provided there has been no unreasonable delay in exercising the right of revocation, and provided he pays into court the benefits received. Apply this rule to the case at bar, and the case is easily solved. It expressly appears from the face of the petition that the plaintiff knew that she had a right to elect to take under the will or by operation of law at the time she received the legacies, for she says she 'accepted the same under protest, and insisted that the will was invalid, and only received the same because, under the law, she would be entitled to one-third of the entire estate—a sum and an amount much larger than the amount received by her as herein stated.' Therefore the plaintiff acted with full knowledge of her legal right of election, and there is no charge that she was induced to accept the benefit by any fraud or deception. It does not appear how long she waited after receiving the benefit before she attacked the validity of the will. The allegation that she is ready and willing to pay the amount received into court, or to have it deducted from

her share of the estate, if the will is set aside, is not sufficient to bring her within the rule which entitles one to contest an instrument after receiving a benefit under it, for the rule requires that the benefit received shall be actually paid into court at or before the filing of the suit. In addition to this, innocent third persons will suffer if she is allowed to revoke her election upon returning the benefits she has received. The major portion of the benefits she has received arose out of the residuum of the estate. That means that all the special legacies had been paid before such residuum was ascertained and paid. These special legacies arose solely out of the will, and, without the will, that money would have gone to other persons. Upon the faith of the plaintiff's acceptance of the benefits conferred upon her by the will, the executors paid out the special legacies to other persons. The plaintiff stood by and saw the executors do so. If the plaintiff should now be permitted to have the will set aside, upon payment into court of the benefits received by her, the special legacies paid by the executors would be lost to them, for the money so expended would go to the heirs, of whom the plaintiff was one. Thus the executors would suffer by a revocation. It is true that the statute permits a will to be contested at any time within five years after its probate in common form, and the statute contemplates that the estate may or will be wound up before that time, and persons who take under a will know that the estate thus derived is liable to be divested by a successful attack thereafter upon the will. But whilst this is true, the lawmakers never intended to permit a legatee under a will to accept the benefits conferred by the will, and then stand by and see the estate wound up, or practically wound up, and then begin proceedings to contest the will, upon returning only the amount received by the contesting legatee. Such a proceeding falls within the rule that denies the right to contest where there has been unreasonable delay. In short, it is plain from the petition that the plaintiff thought she could accept the benefits, and then contest the will, and simply have the benefits received deducted from her share of the estate after the will was set aside. By so doing she stood to gain everything if she succeeded, and to lose nothing if she failed, in the contest proceedings. The law does not sanction such a speculative proceeding. It follows that the plaintiff has not shown herself entitled to maintain this action."

Stone *vs.* Cook, 78 S. W. Rep., 80.

V.

The judgment should be affirmed because the appellant has not shown affirmatively that any evidence was excluded by the court below which, if the estoppel had been out of the way, would or could have led to any different result.

Counsel for the caveator offered, by the mouth of Seth A. Terry, testimony "relating to the mental condition of the alleged testator, George W. Utermehle, prior to the making of his will in December, 1887," and further offered to prove by the same witness that shortly prior to December, 1887, the testator was of unsound mind and not capable of executing a valid deed or contract (158). Objection was made to this evidence on the ground that the evidence already in the case showed that the caveator was estopped from contesting the will on the ground of mental incapacity or on any other ground. Counsel for the caveatees thereupon asked counsel for the caveator if they had any further evidence to offer on the issue of estoppel, and counsel for the caveator stated that before answering the question "in order to raise the point with respect to both issues" the caveator offered to prove by Eugene C. Hannan that he (Hannan) had had opportunities of observing the testator when in the company of his daughter, Mrs. Taylor, and her husband, "and that in the opinion of the witness the testator was unduly influenced" by Dr. and Mrs. Taylor in the making of his will (159). Counsel for the caveator further stated that this testimony was simply the first step; that they had a number of witnesses whom they proposed to examine under the heads of mental incapacity and undue influence, and that they also had witnesses whom they proposed to examine as to

the issues of fraud and duress. Thereupon counsel for the caveator stated that the caveator had no further evidence to offer under the head of estoppel or tender, but that they desired to proceed with their case upon the other issues.

The court, after hearing arguments, then held that the caveator, *on his* own evidence, was estopped to contest the will of his grandfather, and instructed the jury how to answer each of the issues (171). When the third issue was reached, which raised the question whether the testator was of sound mind when he made his will, counsel for the caveator excepted to the instruction of the court to the jury to answer that question in favor of the will, stating that the caveator was prepared to offer testimony as to that issue. A colloquy then took place between counsel and the court, during which counsel for the caveatees gave notice that he should make the point that if only a general offer of testimony was made it would be insufficient. Thereupon counsel for the caveator stated and the court agreed that the understanding between counsel for the caveator and the court was that the court would not hear any evidence from the caveator bearing upon any of the issues other than those which raised the question of estoppel (171–173).

If the court had refused to allow counsel for the caveator to offer evidence upon any of the issues other than estoppel, and had refused to allow counsel for the caveator to make any offer in that regard, it might well be urged here that the caveator had done all that was required of him, and that this court should presume that he had some competent evidence on some or all of the other issues.

But it will be seen that counsel insisted that their understanding with the court was that they should not be required to offer any such testimony. The exclusion of further evidence, or of any sufficient offer as to what that evidence would be, was made at their own volition and after counsel for the caveatees had gone out of their way to notify them that it would be insisted that their exception to the

exclusion of evidence would not be good unless there was a sufficient statement of what that evidence would be to enable the court to say that it might, in some aspect of the case, have entitled the caveator to a verdict in his favor on the issues other than estoppel, or some of them.

It will also be seen that, although counsel claimed that this was the understanding between them and the court, yet as a matter of fact they did make an offer of evidence both as to the issue of unsoundness of mind and the issue of undue influence. That as to mental unsoundness was fatally defective because, first, the witness by whom an opinion was offered on the subject did not state any fact, and no offer was made to prove by him any fact from which an opinion as to the unsoundness of mind of the testator could have been drawn, and, secondly, because his opinion related to a date prior to the date of the will, and no offer was made to show either that the alleged unsoundness was of such a character that a presumption of its continuance would arise, or that it did in fact continue to exist at the time the will bears date. The evidence offered on the issue of undue influence was manifestly insufficient, because the offer was to give evidence by the witness Hannan, that *in his opinion* the testator was unduly influenced in the making of his will by Dr. and Mrs. Taylor. His opinion of this subject would, of coure, have been inadmissible, and if it were admissible it would have to be based upon some fact which was made known to the jury.

It is respectfully submitted that, without regard to the ruling of the court directing a verdict in favor of the caveatees on the issue of estoppel, the judgment should be affirmed, because in his bill of exceptions the caveator has not shown that he was injured by that ruling, whether it was right or wrong.

And certainly unless, the law requires it, an appellate court should not put the caveatees in such a case as this to the enormous expense of another trial when, for all that the

caveator shows to the court, at the end of that trial the jury will have to be instructed to find a verdict in favor of the will upon each of the several issues of undue influence, fraud, duress, and coercion.

In Packet Co. *vs.* Clough, 20 Wall., 528, an error assigned was the rejection of a certain deposition. As to that point Mr. Justice Strong, in delivering the opinion of the court, said:

"Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict."

In Railroad Co. *vs.* Smith, 21 Wall., 255, exception had been taken to the refusal of the trial court to allow a witness to answer certain questions which were set out in the record. It was held that the exception could not be sustained, because the record did not show what it was proposed to prove in answer to them.

Mr. Justice Field, in delivering the opinion of the court, said:

"But although the interrogatories were pertinent and proper in themselves, we are unable to decide whether any harm resulted from the ruling of the court in excluding them and the answers obtained, for the answers are not contained in

the record. For aught that we can know, the witness may have answered that he was unable to state what injury or damage, hindrance or delay was occasioned to the company in the running of the road by the defective character of the bridge, or what number of hands were employed or would have been necessary if the bridge had been properly constructed. We cannot, therefore, see that any harm resulted to the defendant from the exclusion. Whatever may be the rule elsewhere, to render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. Such has been the decision of this court in several cases, and was distinctly affirmed at the present term in the case of Packet Company *v.* Clough."

In U. S. *vs.* Neverson, 1 Mackey, 152—a capital case—the trial judge had permitted a witness to testify in favor of the prosecution whose name had not been given to the defendant in advance of the trial, as required by statute. While it was held that this was error, the court, following the two cases in this court above cited, held that because the bill of exceptions did not show what the evidence was which the witness had given, and the court could not say whether it was material or whether the defendant sustained harm by it, the exception would have to be overruled.

VI.

The court did not err in instructing the jury to render a verdict in favor of the will on the issues of undue influence, fraud, duress, and coercion.

Although the record in this case does not show it, counsel for the caveatees urged in the court below that the issue of estoppel should be tried and determined first, to the end that if it should be determined that the caveator was estopped from contesting the will the time of counsel and the court and the expense to the parties of a long trial of the other issues should be avoided. In our view the case was analogous to those cases in which it is disputed that one who seeks to contest a will as heir is an heir, or those in which a party seeks to contest a will on the ground that he is a legatee under an earlier will which his adversaries insist was revoked before the later will was executed. In all such cases, it seems to us, the right of the caveator to interfere in the matter at all should be determined before entering upon a trial of issues with which it may turn out he has no concern. However, Mr. Justice Cole, to whom this matter was presented, did not agree with us on this point.

The trial judge held properly, we submit, that since the caveator was estopped to contest the will he could not be heard to offer evidence against it.

And certainly if this court shall agree with the trial court in holding that the caveator is estopped to contest the will, or should agree in our contention that his failure to restore (or to even offer to restore to any representative of this estate of his grandfather) what he had received under the will, of itself precludes him from contesting it, it would follow that the ruling of the trial court in relation to the other issues, whether correct or not, did the caveator no harm.

VII.

The trial court did not err in excluding the testimony of the caveator as to declarations made to him by the testator.

If such declarations had been offered for the purpose of showing that at the time they were made the testator was of unsound mind, they would, of course, have been competent for that purpose. Counsel, however, in offering one of these declarations stated that they were made at the time when it was conceded by everybody that the testator was sane, and in offering the other said that it was made at a time when it might be claimed he was sane (55, 56). In offering this evidence counsel stated that they offered it for the purpose of showing the testamentary intentions of the testator, and also to establish a contract between the caveator and the testator (55).

No offer was made to introduce any evidence tending to show that at the time these declarations were made the testator was of unsound mind or that he was in any abnormal mental condition. The learned counsel for the caveator will scarcely contend that evidence tending to show that the testator made a binding contract with the caveator could be admitted as evidence tending to show that at that time he was incapable of making a contract.

The declarations, not being offered on the question of mental capacity, were clearly excluded by the ruling in Throckmorton *vs.* Holt, 180 U. S., 552. We do not care to follow counsel in their reference to other authorities on this subject. The exact point was raised and determined in that case. The issues there were as to forgery and revocation, but the precise question upon which the case turned was whether the intentions of a testator can be shown by his

statements as to what they were at the time he made the statements; and it was distinctly held that such declarations are incompetent for that purpose, because they are hearsay.

This question, of course, is of no importance now if this court should hold that the caveator was estopped to assail his grandfather's will when he filed his caveat, or that he was precluded from attacking it by his failure to restore what he had received from his grandfather's estate directly and indirectly under the will. It would be important only in case this court should hold that the trial judge erred in taking the case from the jury.

On the whole, it is submitted that the judgment below should be affirmed.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

T. PERCY WOODWARD,
Of Counsel.

No. 63.

CHAP. 394. An act conferring on the supreme court of the District of Columbia jurisdiction to take proof of the execution of wills affecting real estate, and for other purposes (30 Stat., 434).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act of Congress entitled "An act relating to the supreme court of the District of Columbia," approved June twenty-first, eighteen hundred and seventy, be, and the same hereby is, amended so as to read as follows:

"That all the powers and jurisdiction by law held and exercised by the orphans' court of Washington county, District of Columbia, prior to the twenty-first day of June, anno Domini eighteen hundred and seventy, are hereby conferred upon the supreme court of the District of Columbia. Such powers and jurisdiction shall continue to be exercised by one of the justices of said court holding a special term for orphans' court business, and from his judgments, orders, and decrees there shall be the same right of appeal to the Court of Appeals of the District of Columbia as is given by section seven of the act of Congress establishing said Court of Appeals, approved February ninth, eighteen hundred and ninety-three: *Provided*, That nothing herein contained shall divest said court or said special term or said justice of any power or jurisdiction conferred upon said court or said special term or said justice by existing law."

SEC. 2. That in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.

SEC. 3. That all issues of fact hereafter arising in the supreme court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution of the validity of any will or testament, shall hereafter be tried before said justice holding said special term, and that when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the supreme court of the District of Columbia sitting as a circuit court for said District.

SEC. 4. That no will or testament shall be hereafter admitted to probate and record in the said District until the following procedure shall have been followed: Whenever any will or testament shall be presented for probate and record to the said justice he shall direct all of the heirs-at-law or next of kin of the testator, or both, as the case may require, to be summoned to appear before him at a certain day, not earlier than ten days from the date of said presentation; if said summons shall be returned personally served upon all of said heirs-at-law or next of kin, or both, at least five days before said return day, then, if no caveat be filed to said will, the said justice may forthwith admit the same to probate and record. But if any of said heirs-at-law or next of kin be returned "not to be found," then the said justice shall cause not less than thirty days' notice of the application for such probate to be published in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And upon such notified day, or such subsequent day as the court shall appoint, the said application for probate shall be heard, due proof of such publication being made; and if no caveat be filed the said will or testament shall be admitted to probate and record. In all cases in which all of the heirs-at-law or next of kin of a testator, or both, consent to such probate and record, such will and testament shall thereupon be forthwith admitted to probate and record without the hereinbefore-described proceedings. In all cases in which any of said heirs-at-law or next of kin is an infant or of unsound mind the said justice shall appoint a guardian *ad litem* for said infant or person of unsound mind: *Provided*, That in no case shall any will or testament be admitted to probate and record save upon formal proof of its proper execution.

SEC. 5. That the preceding sections of this bill shall be subject to the following proviso: Any person interested in said probate who at the time of the final decree admitting any will or testament to probate and record is within the age of twenty-one years may file a caveat to said will within one year after he becomes of age; and any person so interested who at the said time was returned "not to be found" and was proceeded against by order of publication, may file such caveat within two years after the date of said final decree; and any person actually served with process or personally appearing in said proceedings may file such caveat within one year after said date.

SEC. 6. That whenever any caveat shall be filed issues shall be framed under the direction of the court for trial by jury: *Provided*, That in all cases in which all persons interested are *sui juris* and are before the court, the issues may be tried and determined by the court without a jury upon the written consent of all such parties. At least ten days prior to the time of trial all the heirs-at-law or next of kin of the decedent, or both together, with all persons claiming under the will, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any of them be an infant or of unsound mind he shall have a guardian *ad litem* appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned "not to be found," the court shall assign a new day for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And the supreme court of the District of Columbia may from time to time prescribe and revise the rules and regulations for service personally upon such party outside the District of Columbia of a copy of such issues and notification, but personal service upon absent defendants shall in no case be essential to the jurisdiction of the court in the premises. Upon the day notified, or such subsequent day as the court shall appoint, the court shall proceed with the trial of said issues, due proof of such publication and, when required, of such personal service being made, and due opportunity being given to any party in interest to demand other and further

issues. On the trial of any such issue exceptions may be taken to the rulings of the court, which shall be embodied in a bill of exceptions, to be settled and signed by the justice presiding within such time as may be fixed by the rules of practice prescribed from time to time by the supreme court of the District of Columbia in general term, and the said justice shall have the same power to set aside the verdict and grant a new trial that is possessed and exercised by the supreme court of the District of Columbia in cases tried with a jury according to the course of the common law, and as to such trial shall have all other powers now vested by law in the supreme court of the District of Columbia holding a special term as a circuit court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceeding in error and to such revision as the common law provides, be *res judicata* as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally.

SEC. 7. That in addition to the power and jurisdiction conferred by this act and by prior laws upon the supreme court of the District of Columbia holding a special term for orphans' court business, said court is hereby given plenary authority to administer also the real estate situated in the District of Columbia of decedents, so far as may be necessary for the payment of debts and legacies, and to distribute among those entitled thereto any surplus proceeds of any sale of real estate made in the course of such administration, and that the bonds hereafter executed of all executors and administrators shall be responsible for the proceeds of sale of all real estate sold by them under the order of the said justice for such purposes of administration: *Provided, however*, That no such sale shall be made unless the same be required for the purposes of paying debts and such legacies as are chargeable upon the real estate, nor until the auditor of the court shall have ascertained and reported a deficiency of personal assets for such purposes, and such report shall be subject to exception.

SEC. 8. That the foregoing sections of this act shall apply only to wills and testaments hereafter offered for probate, and, in cases of intestacy, to the estates of such persons as shall die after the passage of this act: *Provided*, That in the supreme court of the District of Columbia holding a term

for orphans' court business any person interested under any will heretofore filed in said court may offer the same for probate as a will of real estate, whereupon such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate.

SEC. 9. That the said justice may authorize and direct collectors heretofore or hereafter appointed to discharge *pendente lite* all or any of the duties of an administrator.

SEC. 10. That the record in the office of the register of wills for the District of Columbia of a duly certified copy, or transcript of the record of proceedings, admitting any will or codicil to probate outside of the District of Columbia; and the record in said office of any will or codicil heretofore admitted to probate in said District, and which shall not have been annulled or declared void according to law prior to the passage of this act, shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act: *Provided*, That the provisions of this section shall not apply to any proceedings at law or in equity pending at the date of the passage of this act, or commenced within one year after the passage of this act, wherein or whereby the validity of such will or codicil is or shall be called in question.

SEC. 11. That the supreme court of the District of Columbia in general term is hereby authorized and empowered to make all such rules of practice as shall be necessary for the exercise of the jurisdiction hereby conferred, and to revise and alter such rules from time to time as it may deem proper.

SEC. 12. That all laws and parts of laws inconsistent herewith are hereby repealed.

Approved, June 8, 1898.

Supreme Court of the United States.

No. 63.—October Term, 1904.

Charles H. Utermehle, Plaintiff in Error, vs. Mamie E. Norment et al. } In error to the Court of Appeals of the District of Columbia.

[February 20, 1905.]

The plaintiff in error seeks by this writ to review the judgment of the Court of Appeals of the District of Columbia, (App. D. C. ,) affirming the decree of the Supreme Court of that District, sitting as a court of probate, admitting the will of George W. Utermehle to probate as a will of real estate, by virtue of the jurisdiction conferred upon the court by the act of Congress of June 8, 1898. (30 Stat. 434.) The same will had been admitted to probate in the District in the year 1889 as a will of personalty, (which was all the jurisdiction at that time possessed by the court,) with the concurrence and consent of the plaintiff in error. The facts upon which the case hinges are in substance the following:

George W. Utermehle, the testator, died in the city of Washington on the 16th day of April, 1889, leaving a large amount of real and personal property, the real estate amounting, as is said, to about a million dollars, and the personalty to between six hundred thousand and a million of dollars. He left a will, bearing date December 7, 1887, which appeared on its face to have been duly executed for the conveyance of real estate. The testator left him surviving his widow, two daughters—Mrs. Taylor and Mrs. Norment—and the plaintiff in error, his grandson, the son of his deceased son, as his sole heirs at law and next of kin. The widow was named executrix of the will, and she propounded the same for probate April 26, 1889. It was duly admitted to probate on that day, on the petition of the widow, as executrix, with the written consent of the daughters and the plaintiff in error. The executrix gave a bond in the sum of $20,000 for the payment of all just debts and claims against the deceased and for the payment of the legacies bequeathed by the will, and letters were issued to her. She duly administered upon the estate, paid the funeral expenses and other charges, and the legacies mentioned in the will, including that to the plaintiff in error. She filed no inventory but made a statement of account on the 14th day of May, 1890. The personal property, except such as was otherwise disposed of under the will, and in payment of debts and legacies, she retained for herself, as sole and absolute owner, in accordance with the terms of the will. Of this amount

it is said that she thereafter disposed of a large part in charities. By the will of George W. Utermehle, he bequeathed to each of his three nieces, residing in Germany, the sum of three thousand dollars; he devised to his grandson, the plaintiff in error, the property known as the Young Law Building in Washington; he also bequeathed to him the interest due or to become due on a note for $750, secured on a lot in Washington, and also the principal of the same; he bequeathed to his wife, Sarah Utermehle, all the rest of his personal property, of every kind, to be taken by her in lieu of dower, and to be disposed of by her by deed, will or otherwise, as she pleased; he devised to her his then present residence and the property adjoining, being square 765 in the city of Washington; he then bequeathed all the rest and residue of his real estate wherever situated, and all the real estate of which he might die seized and possessed, other than that already devised, to his two daughters, Mamie Norment and Rosa Taylor, as tenants in common, share and share alike; he appointed his wife sole executrix of his will and revoked all other wills theretofore made by him; he suggested that, as he had no debts and his personal estate was to go to his wife, a very moderate bond should be required of her as executrix.

After the death of his grandfather the plaintiff was present at his late residence and heard this will read.

Immediately after the reading of the will he left the house, but Mrs. Taylor, one of his aunts, as he was leaving, asked him to come over the next day, which he did. He testified on this trial that he arrived at the house and went into the dining room, and Mrs. Taylor, Mrs. Norment and his grandmother were there. Mrs. Taylor did the talking, and started the conversation by stating to the plaintiff in error that the will had virtually cut him off, and that if it had not been for her and the Doctor (her husband) the plaintiff in error would not have been left the property called the Young Law Building, but that they had had his grandfather paint it up and put it into repair, so that when it came into his possession it would not be any expense to him to put it in condition at the time. She further said that his grandmother was left all the personal property, which amounted to almost, if not quite as much, as that which they (his aunts) would receive under the will, and that when his grandmother died she proposed to make him right, to make him equal with them by equalizing his share; that his grandmother wanted to know what the mortgage on his farm was, as she understood that there was a mortgage; that she wanted to pay it off; that she wanted to start him off without any debts on him. His grandmother was sitting there at the time but said nothing. He was asked what the mortgage was on his farm. He told them $11,500. The only remarks made were those between Mrs. Taylor (his aunt) and himself, and the only statement he made was what the mortgage on the farm was. He also testified on the trial

below that he believed what was then promised him, as to what his grandmother would do when she made her will; that he had no doubt whatever that she would fulfill her promise. His grandmother told him at that interview she would give him a check for the mortgage in a few days, and he then went home. Subsequently and on the 26th day of April, 1889, he signed the consent to the probate of the will. He did it in reliance, as he said, upon the promise above mentioned.

From the time of the probate of his grandfather's will up to the time of the death of his grandmother, he did nothing to attack the will of his grandfather, but relied upon the promise made by or on the part of his grandmother, the day after the funeral. After the probate of his grandfather's will he received from his grandmother, as the executrix, the legacy spoken of therein, and gave receipt therefor; he also took possession of the real estate given him by the will, called Young's Law Building, and received the rents therefor for nearly two years, and (on March 24 1891) sold it for $20,000, and kept the proceeds. The sisters took the real estate devised to them by the will. They commenced an action of partition and the real estate was partitioned between them, and each thereafter treated the real estate set off to her under the partition as her own absolute property. Some of it they conveyed and disposed of so that it passed beyond their control. They assumed and supposed that the real estate given to them in the will was their own, as the plaintiff in error had consented to the probate of the will, and had made no objections whatever since that time to its validity, or questioned it in any way.

On the 13th of March, 1893, the grandmother died, leaving a will dated July 5, 1889, less than three months after the promise alleged to have been made by her, or in her behalf, to the plaintiff in error immediately after the funeral of his grandfather. The will of the grandmother was admitted to probate, by the consent of all the parties interested, on the 17th day of March, 1893. The two daughters were executrices under the will, but, on objection being made by the plaintiff in error to their receiving commissions, they waived their right to them, and performed the services without pay. By the terms of this will the two aunts and the plaintiff in error were made to share equally in the estate of the grandmother, which turned out to amount to something over $200,000, the grandmother having, during her lifetime, as is stated, disposed of a large amount of the personal property bequeathed to her under the will of her husband, in charities. When the terms of the will of the grandmother were read to the plaintiff in error he testified on the trial below that he then said, "So far as I am concerned I have got the worst of and I have got to stand it. I never made but one mistake in my life, and that was when I held still once before, and now I have to stand still."

He received under the will of his grandmother $84,256.87, being the same share as was received by each of his aunts. He received, under the will of his grandfather and that of his grandmother a total of between $140,000 and $150,000. After the death of his grandmother he took no steps showing an intention to contest the will of either, until May 19, 1900, which was ten years after the settlement of the estate of his grandfather and nearly seven years after the settlement of the estate of his grandmother. On the date named he addressed two letters of the same tenor, one to Mrs. Taylor and the other to Mrs. Norment, in which he states that he had been under a misapprehension and was ignorant regarding his rights at the time his grandfather died, and that misrepresentations had been made to him from those interested, touching his rights and interest in his grandfather's estate, and he therefore notified them that he denied the validity of the paper writing alleged to be the last will and testament of his grandfather, which had been admitted to probate as a will of personal property, and stated that he contended that the alleged will had never been operative in connection with the real property, and that his claim to the building and ground known as Young's Law Building was merely a one-third interest in the property as tenant in common with the other heirs at law of his deceased grandfather; he also stated that he held himself ready to account, upon demand, to his two aunts for the one-third interest to which each was entitled in that real estate, as two of the heirs at law of his grandfather, in both the property, and the rents and profits from the same, from his grandfather's death; that he held himself as ready, upon demand, to make proper settlement with both of his aunts for the $750 note, with the accrued interest thereon, which had been all paid, and was pretended to have been bequeathed to him under the will of his grandfather. Plaintiff in error testified that he did not receive any answer to either letter, nor any communication from either of his aunts, and soon thereafter he instituted a suit in ejectment, and on June 9, 1900, filed a *caveat* in the Probate Court against the validity of the will, as a will of personalty. The plaintiff in error there charged that the will was procured by the fraud, undue influence and duress of Mrs. Taylor and her husband, and that the testator had no testamentary capacity when the paper was signed by him. Mrs. Taylor and Mrs. Norment answered this *caveat*, and at the same time filed a petition asking for probate of the will of their father, of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898, above mentioned. To this petition the plaintiff in error made answer.

Pending proceedings in the Probate Court on this *caveat* of the plaintiff in error, and the petition for the probate of the will as one of real estate, Mrs. Taylor, one of the aunts, died, January 22, 1901, leaving a will by which she devised all of her estate and property to her husband, subject to an annuity to her son, and nominated her husband as executor. This

will was duly admitted to probate on the 18th day of March, 1901, and letters testamentary were issued to Dr. Taylor (the husband.) Thereupon he filed his petition in these proceedings, wherein he stated that the property devised and bequeathed to him by his wife was in fact to be held in trust by him for the benefit of his son and his children, with the reservation of certain rights and powers for himself, and he asked that the parties named by him be made parties to the present proceedings in place of Mrs. Taylor, and they were accordingly made such.

The court then determined that issues should be formulated between the parties, to be tried in the Probate Court with a jury, under the act of June 8, 1898, and there were six issues thus drawn: The first was in regard to the question whether the plaintiff in error was estopped to deny the validity of his grandfather's will as a will of personal property; the second, whether he was estopped to deny its validity as one disposing of real property; third, was a question as to the testamentary capacity of the grandfather; the fourth, whether there was undue influence; fifth, whether there was fraud in obtaining the will from the grandfather; and sixth, whether there was duress.

It was stipulated that the question of the application of the statute of limitations, which was raised by the *caveats* and petitions, and all other questions, should be reserved for future determination by the court. Charles H. Utermehle was made plaintiff for the purpose of the trial, and all the other parties were made defendants. On March 17, 1902, a jury was impanneled and the trial commenced. The plaintiff proceeded to give his testimony, addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for plaintiff in error announced their testimony on the question of estoppel closed, they were about to proceed with their testimony on the other issues, but counsel for the defendants objected, and asked the court to direct a verdict against the plaintiff on the issue of estoppel, and against the plaintiff upon all the other issues. After consideration the court instructed the jury to render a verdict against the plaintiff on each and all the issues, and a verdict was thus rendered and recorded. Thereupon an order or decree was rendered affirming the decree of April 26, 1889, admitting the grandfather's will to probate as and for a will of personalty, and also admitting it now to probate as and for a will of real estate under the act of Congress of 1898. The Court of Appeals having affirmed this decree, the case has come to us by writ of error on the part of plaintiff.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It is true that the plaintiff in error has received out of the estates of his grandfather and grandmother only between the sum of $140,000 and

$150,000, while an equal division of the estate of his grandfather, between himself and his aunts, would have given him a much larger sum. What was the reason, if any, for this discrimination, the record does not show.

When the will of his grandfather was read the plaintiff in error was perfectly aware of its contents. He was a young man, nearly twenty-four years of age, married, and there is no proof that he was not of ordinary intelligence and capacity. There is no pretence in the evidence that there was any fraud or misrepresentation connected with obtaining his consent to the probate of the will, without opposition or contest on his part. By his own statement he understood distinctly from one of his aunts, after the reading of the will, that it substantially cut him off; that he would receive under the will a devise of the Young Law Building, worth about $20,000, and a bequest of the note of $750 and accrued interest, amounting to not quite $3,000, and that that was all that was given him under the will. He knew it when the will was read. There is not a particle of evidence that he did not know that, if there had been fraud or undue influence or duress in obtaining the alleged will from his grandfather, or if the latter was without testamentary capacity, such will would be void. The trial court, indeed, observed that he admitted he knew what his legal rights were at the time of the death of his grandfather, if there were no will. He was ignorant only of any evidence on which to base a contest against the proof of the will. He says he did not know at that time that fraud or undue influence or duress had been exercised, in order to obtain the will, nor did he know that his grandfather lacked testamentary capacity to execute a will, but there is no evidence whatever that any means were used or representation made to prevent him from ascertaining what the facts really were. The reason for his not contesting was, as he said, his reliance on the promise alleged to have been made by or on behalf of his grandmother to make him equal by her own will. On account of this promise he did not contest the will. By reason of his consent, his aunts, the other heirs at law of his grandfather, proceeded to make partition of the real estate given to them by the will, and to use, convey and dispose of it as if it were absolutely their own property. His grandmother received the personal property bequeathed to her by the will and disposed of large amounts of it prior to her death by gifts to charity and otherwise. It would be impossible to place the other heirs in the same position that they were in at the time of the death of the grandfather. The two aunts, if that will had not been proved, would have received their share of the personalty instead of almost the whole of it going to the mother. Under the will, however, the mother took the personalty and spent or disposed of large portions of it, so that she died possessed of only about $200,000, and the two aunts and the plaintiff in error have received an equal share of that sum. The aunts would have received a much larger

share of the personalty had it not been for the will of their father. As is stated by the Court of Appeals in the opinion delivered in this case:

"It is impossible to tell from the record before us whether they (the aunts of plaintiff in error) fared any better with the will than they would have fared without it; but it is very evident that by the bequest of the entire personalty by the will to their mother, they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation, and the attempt to do so would be to wantonly question titles that have long since accrued, including the very title which the caveator has himself disposed of to the Young Law Building."

Of the witnesses to the grandfather's will, two are dead and the third paralyzed. From the date of the probate of the grandfather's will in April, 1889, down to the 19th of May, 1900, the plaintiff in error took no steps towards a contest. On that date he wrote the letters to his aunts, above referred to, and therein he says that misrepresentations were made to him as to his rights and interest in the estate. We find a total absence of all proof as to any such misrepresentations, either as to his rights or his interest in the estate of his grandfather. The trial court also found that the plaintiff in error had not exhibited even reasonable diligence to learn any facts as to the will of his grandfather, and that his alleged ignorance of the law was the only excuse which had the semblance of sufficiency.

We have, therefore, his consent given in April, 1889, to the probate of the will of his grandfather; his taking the legacy provided for under that will; his taking possession of the real estate devised to him by that will; his receipt of its rents and profits, and his subsequent sale thereof for $20,000, and the retention of that sum for his own purposes; his consent to the probate of his grandmother's will, although it clearly does not fulfill the promise he alleges was made on her behalf after the death and funeral of his grandfather; no movement is made on his part or sign of discontent given for about seven years thereafter, and then he writes letters and files his *caveat* and proceeds, as already stated. We have the total lack of diligence in the attempt even to ascertain facts. After his grandmother's death he says that he was still ignorant of the facts which he alleges he has since discovered of the existence of fraud in obtaining the will from his grandfather, and of the latter's lack of testamentary capacity, and the existence of duress and undue influence under which the will was obtained; and he also avers that he was ignorant of the law at the time that he consented to the probate of his grandfather's will that he could not take a devise or bequest under that will, and at the same time seek to prevent its probate or to set it aside as an invalid instrument. The trial court found that right after the death of his grandmother he had the advice of counsel, and if he had been ignorant of any rights he would have been informed of the same.

The plaintiff in error asserts that he gave consent to the probate of his grandfather's will because of the promise of his grandmother to rectify by her will the injustice resulting from the will of his grandfather, and when he found that the promise was broken, on reading the will of his grandmother after her decease, he then waited seven years before proceeding to attack the will of his grandfather, admitted to probate in 1889. The Court of Appeals doubted the existence of the promise, and said it was probably only a promise that he should share equally in his grandmother's estate, which his grandmother fully performed. He says that after the death of his grandmother he was very ill for six weeks, and that for two years he was not in good health, and that he remained ignorant of the fraud and undue influence and duress and mental incapacity of his grandfather until a short time before the filing of the *caveat* or the writing of the letters. He does not contend that if these facts existed, he did not know that, if proved, they would avoid the will.

He insists, however, that the law pertaining to the taking of a legacy or devise under a will, which prevents the assertion of the invalidity of the same will, ought not to bind him, because he was ignorant that such was the law; in other words, the law should not cover his case because he was ignorant that it was the law.

We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defence against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defence thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defence, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition there ought to be no negligence in attempting to discover the facts. The ignorance of the plaintiff in error as to his alleged rights, it would seem, was an ignorance of the existence of alleged facts regarding the procurement of the will of his grandfather, but he does not pretend that, had he known of their existence, he was ignorant of their effect as a ground for refusing probate of the alleged will. The ignorance of evidence to substantiate what he knew were his rights is a very different thing from ignorance of the rights themselves, as is stated so clearly by the Court of Appeals; and so it rests in this case that the only obstacle to the enforcement of the rule of estoppel rests in the alleged ignorance of the plaintiff in error that such a rule existed. Although his action in consenting to the probate of the will of his grandfather was not the result of fraud or misrepresentation, and the other parties to this litigation cannot be placed back in the position they occupied when the will was admitted to probate, and this condition is the result of the action of the plaintiff in error in consenting to the probate of the will, yet he now contends, not-

withstanding all this, that he must be permitted, after the lapse of eleven years, to attempt to defeat the will of his grandfather because he did not know the law applicable to the case in hand. This is a totally inadmissible proposition.

It has been held from the earliest days, in both the Federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. *Hunt* v. *Rousmaniere's Adm.*, 1 Pet. 1–15; *Bank of the United States* v. *Daniel*, 12 Pet. 32–55; *United States* v. *Hodson*, 10 Wall. 395–409; *Lamborn* v. *County Commissioners*, 97 U. S. 181–185; *Snell* v. *Insurance Co.*, 98 U. S. 85–90–92; *Allen* v. *Galloway*, 30 Fed. Rep. 466, where Hammond, J., in reviewing the decisions of this court, says: "Whatever rule may prevail elsewhere, there can be in the equity courts of the United States no relief from a mistake of law." *Drake* v. *Wild*, 70 Vt. 52–59; in that case the court said (p. 59): "That ignorance of the law does not excuse a wrong done or a right withheld. That relief from liabilities under the law, arising from a known state of facts, will be denied. But to these general rules there are exceptions, as where there is a mistake of law caused by fraud, imposition or misrepresentation. We think it will be found that in most of the cases cited in these notes, and in Pomeroy, the party seeking relief was led into error by the action of the other party to a transaction, as in contracts and releases." *Light* v. *Light*, 21 Pa. St. 407–412; *Storrs* v. *Barker*, 6 Johns Chy. 166; *Whitwell* v. *Winslow*, 134 Mass. 343–345; *Alabama Railway* v. *Jones*, 73 Miss. 110; *S. C.*, 55 Am. St. 488, note.

Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party. In this case there was, as we have said, neither fraud nor imposition, nor misrepresentation; plaintiff in error was not advised that, although he took under the will, he could attack it. It is a simple, bald case of an alleged mistake or misapprehension, on the part of plaintiff, of what the law was under certain circumstances, with no representation or persuasion on the part of others to cause him to act upon such mistaken assumption.

As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit.

In *Hyde* v. *Baldwin*, (17 Pick. 303, 308,) it was held that one who accepted the beneficial interest under a will was thereby barred from setting up any claim which would defeat the full operation of the will. *Drake* v. *Wild*, (70 Vt. 52,) holds the same doctrine. In that case a

party was held to be estopped from asserting her title to a trust fund disposed of by the will, because she had accepted the provisions of the will in her own favor. In *Branson* v. *Watkins*, (96 Ga. 55,) it was held that one who took an estate under a will was thereby estopped from at the same time denying its validity as a will, or from questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings. In *Smith* v. *Smith*, (14 Gray, 532,) it was held that the acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. In *Fry* v. *Morrison*, (159 Ill. 244,) it was held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effect of any part of the will. And in *Madison* v. *Larmon*, (170 Ill. 65, 82,) it was again held that one who takes under a will cannot contest it as an heir at law of the devised property. So, in *Fisher* v. *Boyce*, (81 Md. 46, 53,) the court said: "It is a maxim in a court of equity not to permit the same person to hold under and against a will. . . . This maxim was equally appropriate to the jurisdiction and practice of courts of law, and where one claimed under a will he must give it effect as far as he can, and he will be estopped from denying ing its validity and genuineness. (*Waters' Appeal*, 35 Pa. St. 523; *Thrower* v. *Wood*, 53 Ga. 458.)"

When in addition to the fact that he took a benefit under the will, a party has acquiesced in its validity for many years, and the opposing party in interest has acted upon such consent and acquiescence, and has so changed his position on that account that he cannot be restored to it, and where witnesses have in the meantime died, the reason for the rule upon which an estoppel is founded is thereby greatly strengthened.

Two cases, among others, were cited by counsel for plaintiff in error, in the court below, and are referred to in the opinion of the Court of Appeals, and they are also cited here for the purpose of showing his right to maintain these proceedings to set aside the will of his grandfather. They are: *Spread* v. *Morgan*, (11 H. L. Cases, 587, decided in 1864;) *Watson* v. *Watson*, (128 Mass. 152, decided in 1878.)

In the English case it was held that one remaining in possession of two estates, under titles not consistent with each other, thereby afforded no decisive proof of an election under which title to take. It was there held that the rule was, "that if a party being bound to elect between two properties, not being called upon to so elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference, cannot be an election to take the one and reject the other."

We think the case has no application to the one at bar, and is well distinguished in the opinion of the Court of Appeals in this case.

In *Watson* v. *Watson, supra,* the general doctrine that any person taking a beneficial interest under a will, thereby confirmed it and could not set up any right or claim of his own, which would defeat or in any way prevent the full operation of every part of the will, was recognized and affirmed, but it was said (page 155):

"An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed."

Regarding the legatee who took a legacy under the will, the court continued (at p. 157) as follows:

"But as to Edward the case stands differently. Immediately after being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, *or the position of any other person had been changed,* he returned his legacy to the executor and gave him notice that he elected not to take it. He cannot therefore be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate, not excepting the parcel claimed by respondent."

In this case the position of other parties to this litigation has most materially changed, as has already been shown, (the particulars of which need not be repeated,) while the plaintiff in error has been also guilty of extreme negligence even in attempting to discover what he alleges are facts. We are satisfied that the plaintiff in error is estopped from now contesting the will, and that great injustice would result from the overturning of the principle adjudged in so many cases.

We are of opinion the case has been rightly decided, and the judgment of the Court of Appeals of the District of Columbia is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE